132-491

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~321.~~ 58

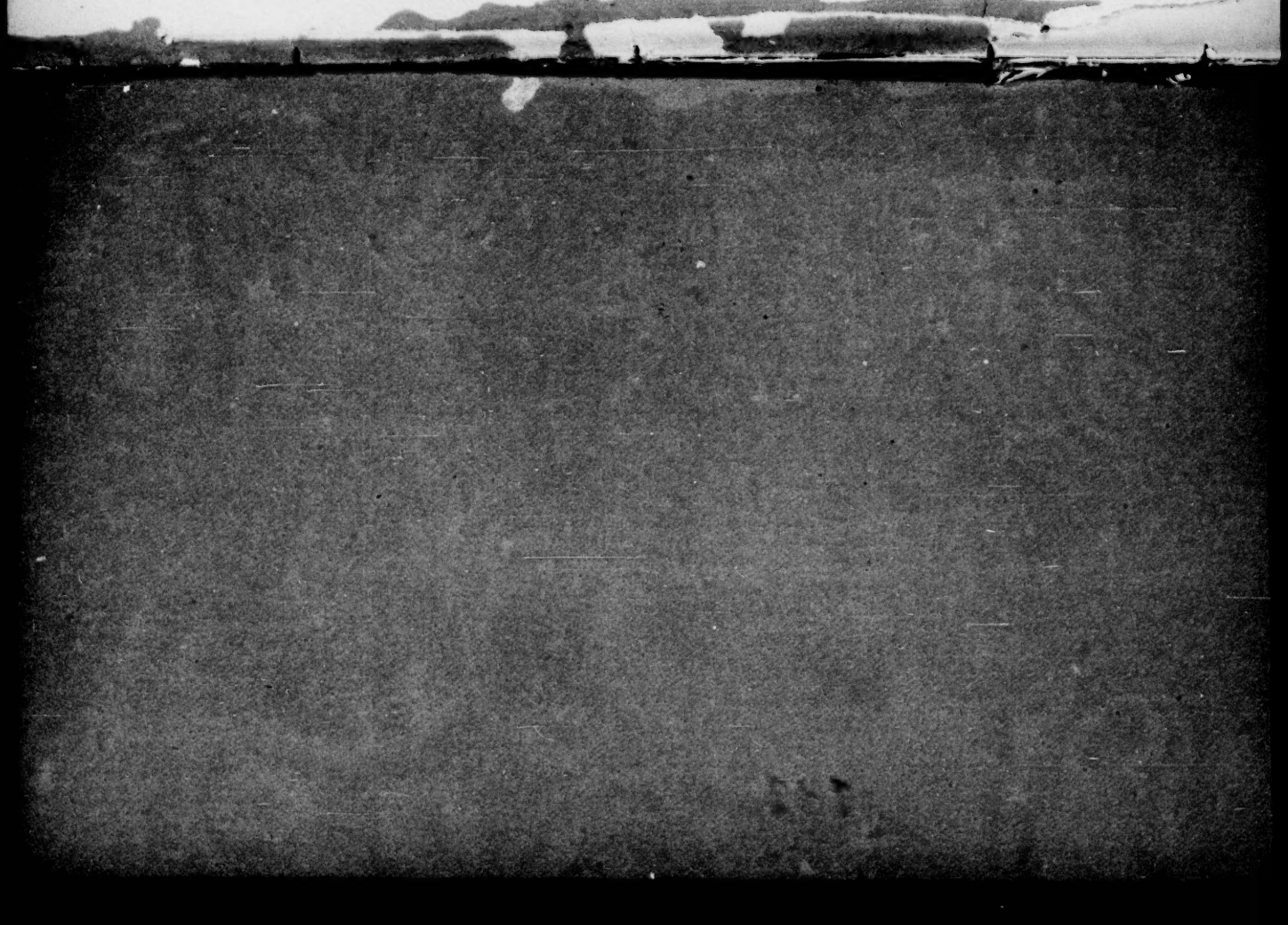
WILLIAM H. ROBERTSON, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

HENRY R. BRADBURY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 19, 1886.



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1 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Henry R. Bradbury, plaintiff, and William H. Robertson, defendant, a manifest error hath happened to the great damage of the said William H. Robertson, as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-six, in the said Supreme Court, to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 20th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

[SEAL.] TIMOTHY GRIFFITH, *Clk.*

The foregoing writ is hereby allowed.

ADDISON BROWN.

2 (Indorsed:) 8809, U. S. Supreme Court. William H. Robertson, plaintiff in error, against Henry R. Bradbury, defendant in error. Writ of error. Stephen A. Walker, attorney for plaintiff in error.

Due service of a copy of the within is hereby admitted this 20 day of May, 1886.

HARTLEY & COLEMAN,
Attorneys for Def't in Error.

U. S. circuit court, S. D. N. Y., May 20, 1886. Timothy Griffith, clerk.

UNITED STATES OF AMERICA,
Southern district of New York, ss:

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second
3 circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from four to fifty-five inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of William H. Robertson, plaintiff in error, against Henry R. Bradbury, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this seventeenth day of August, in the year of our Lord one thousand eight hundred and eighty-six and of the Independence of the United States the one hundred and eleventh.

[SEAL.] TIMOTHY H. GRIFFITH, *Clk.*

4 *Summons.*

Supreme court of the State of New York, city and county of New York.

HENRY R. BRADBURY, PLAINTIFFS,
against
WILLIAM H. ROBERTSON, DEFENDANT.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys, within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, Nov. 1, 1883.

HARTLEY & COLEMAN,
Plaintiff's Attorneys.

(Office and post-office address, 62 Wall street, New York City.)

5 (Indorsed:) 2438. N. Y. supreme court. H. R. Bradbury against William H. Robertson. Summons. Hartley & Coleman, plff's attorneys, 62 Wall street, New York City.

6 *Complaint.*

Supreme court of the State of New York, city and county of New York.

HENRY R. BRADBURY, PLAINTIFF,
vs.
WILLIAM H. ROBERTSON, DEFENDANT.

Plaintiff complains:

1st. That defendant was, during the times hereinafter named, collector of customs of the United States at the port of New York.

2d. That plaintiff, during said times, duly imported and entered at the port of New York the goods described in the bill of particulars annexed.

3d. That plaintiff, in order to obtain said goods, was compelled to pay the defendant, as such collector, the sum of five hundred and
7 thirty-nine $\frac{59}{100}$ dollars in excess of the lawful rate of duty on said goods and of the amount required by law.

4th. That plaintiff filed with the said defendant due and timely protests, in writing, upon each entry of said goods against his decision, exacting such duty, setting forth distinctly and specifically the grounds of objection thereto.

5th. That plaintiff made due and timely appeals on each entry to the Secretary of the Treasury, who has neglected for more than ninety days, as well from the dates of said appeals, as prior to the commencement of this action to decide said appeals.

6th. That the bill of particulars hereto annexed states for each importation separately the date of entry at the custom-house, of the pay-
8 ment of duty in excess of the filing of the said protests, of the appeal to the Secretary of the Treasury, and of his decision thereon, if rendered, together with the other particulars required by law, and is made a part hereof.

7th. That said sum, so exacted as aforesaid, has never been repaid to plaintiff, and is still due and owing to him.

Wherefore, plaintiff demands judgment against defendant for the sum so exacted as aforesaid, with interest on the several sums named in the bill of particulars, from the several dates of payment as appears thereby, together with the costs and disbursements of this action.

HARTLEY & COLEMAN,
Attorneys for Plaintiff.

9 *Bill of particulars.*

Importer, Henry R. Bradbury.

Description of goods.—Asphaltire.

Vessel and whence imported.	Invoice.	Entry.	Payment of excessive duty.	Amount of excessive duty.	Date of liquidation at custom-house of protest and appeal.	Decision.
Edith.—Chas. H. Marshall. From Antwerp.	Apr. 20, 1883 Apr. 20, 1883	May 23, 1883 May 21, 1883	May 23, 1883 May 21, 1883	$277. 04 262. 55	July 23, 1883 July 25, 1883	None.

(Endorsed:) Supreme court, city and county of New York. Henry R. Bradbury agt. William H. Robertson, complaint and bill of particulars. Due service of a copy hereof is hereby acknowledged this 9th day of Nov., 1883.

ELIHU ROOT,
U. S. Att'y, Attorney for Def't.

HARTLEY & COLEMAN,
Pl'ff's Att'ys, 62 Wall st., New York City.

10 *Certiorari.*

The President of the United States of America to the judges of the supreme court of the State of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause, commenced before you against

William H. Robertson, defendant, by Henry R. Bradbury, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 22d day of November, 1883, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, esquire, Chief Justice of the Supreme Court of the United States, the 17th day of November, in the year one thousand eight hundred and eighty-three.

TIMOTHY GRIFFITH, *Clerk.*
ELIHU ROOT,
United States Attorney, Attorney for Defendant.

11 (Indorsed:) 8809. U. S. circuit court. H. R. Bradbury vs. William H. Robertson. Copy certiorari. Elihu Root, U. S. attorney, attorney for defendant.

Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York.

New York, Nov. 17th, 1883.

Yours,

ELIHU ROOT,
U. S. Attorney, Attorney for Defendant.

To HARTLEY & COLEMAN,
Plaintiff's Attorney.

12 *Answer.*

Circuit court of the United States for the southern district of New York.

HENRY R. BRADBURY
versus
WILLIAM H. ROBERTSON, COLLECTOR, ETC., } 8809.

The defendant answers to the complaint as follows:

I. He denies that the true duty, or that the true and lawful rate of duty, on the goods referred to in the complaint was as stated in the complaint; and he denies that the plaintiff was compelled to pay or did pay defendant, as collector or otherwise, the sum stated in the complaint or any sum in excess of the amount required by law as duties upon the said goods or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise.

II. He denies that the plaintiff filed with defendant any protest or protests in writing in which the grounds of objections to the exaction of duties on said goods were distinctly and specifically stated.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiff.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the times therein mentioned were in fact such goods as are described in the said complaint.

13 V. And further answering, defendant alleges that all moneys received

by him from the plaintiff in respect of the importations in the complaint alleged to have been made were demanded of plaintiff and were by plaintiff voluntarily paid to him in his capacity as collector of customs as and for duties due the United States on imported merchandise, and were forthwith before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiff paid over by the defendant in his official capacity aforesaid to the United States and placed beyond his control.

VI. And further answering, defendant alleges that all moneys received by him from the plaintiff in respect of the importations in the complaint alleged to have been made were sums due from plaintiff to the United States as duties according to the rate of duty imposed by law upon articles of merchandise imported by plaintiff and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiff's entry thereof were collected or received by defendant from the plaintiff.

Wherefore defendant demands judgment, that the complaint be dismissed with costs.

ELIHU ROOT,
United States Attorney, Attorney for the Defendant.

(Indorsed:) 8809. U. S. circuit court, southern district of New York. Henry R. Bradbury vs. W. H. Robertson, collector, etc. Answer. Elihu Root, United States attorney, attorney for defendant. New York, July 23, 1884. To Hartley & Coleman, plaintiff's attorney.

14 *Minutes of trial.*

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms in the city of New York on Wednesday the second day of December, in the year of our Lord one thousand eight hundred and eighty-five.

Present, the honorable Hoyt H. Wheeler, sitting as circuit judge.

HENRY R. BRADBURY
v. } 8809.
WILLIAM H. ROBERTSON.

Now comes the plaintiff, by Hartley & Coleman, esq's, his attorneys' and moves the trial of this cause; likewise comes the defendant, Sam'l B. Clarke, esq., asst. U. S. atty., his attorney. Thereupon a jury is empaneled and the cause proceeds to trial. After hearing the evidence of the parties, the argument of counsel, and the instructions of the court, on Thursday, December 3, 1885, the jury retire, and on their return render a verdict whereby they find for the plaintiff in the amount of six hundred and five dollars and seventy-five cents, with interest thereon from the date of payment.

15 It is ordered that a certificate of probable cause be entered herein, and that the defendant have a stay of all proceedings on said verdict for thirty days.

A copy:

TIMOTHY GRIFFITH,
Clerk.

Judgment.

Therefore it is considered by the court now here that plaintiff recover of said defendant the sum of six hundred and ninety-seven $\frac{80}{100}$ dollars, being the amount found due by the jury, with interest from May 23, 1883, the date of payment to the date of verdict, December 3, 1885, and also for nineteen $\frac{04}{100}$ dollars interest, and forty-nine $\frac{85}{100}$ dollars, the costs and disbursements of said plaintiff, awarded to him with his assent by the court, amounting in all to the sum of seven hundred and sixty-six $\frac{69}{100}$ dollars, and it is certified that defendant had probable cause in making the
16 exaction complained of.

Judgment signed this 17th day of May, A. D. 1886.

JOHN A. SHIELS,
Dep'ty Clk.

Judgt.,	$697.80
Costs,	49.85
Interest,	19.04
	$766.69

(Indorsed:) U. S. circuit court, southern district of New York. Henry R. Bradbury vs. William H. Robertson. Judgment roll. Hartley & Cloleman, pl'ff's att'ys, 62 Wall st. New York City. U. S. circuit court. Filed May 17th, 1886, 3 p. m. Timothy Griffith, clerk.

17 United States circuit court, southern district of New York.

HENRY R. BRADBURY
vs.
WILLIAM H. ROBERTSON AS COLLECTOR of customs, &c. } N. S. 8809.

Bill of exceptions.

And afterwards, to wit, on the 2d day of December, 1885, this cause came on to be tried at a stated term of the above-named court, duly holden before the honorable Hoyt H. Wheeler, district judge of the United States for the district of Vermont, duly assigned to hold this court, and a jury duly empaneled and sworn to try the issues herein.

The above-named parties appeared, respectively, by their counsel, Edward Hartley, esq., for the plaintiff, and Samuel B. Clarke, esq., ass't United States attorney, for the defendant.

And during the course of the trial, & before the rendering of the verdict therein, the counsel of the defendant did take and allege cer-
18 tain exceptions to certain rulings of the court, which exceptions were by the court duly allowed, and are hereinafter more at large set out.

To sustain the issues on his part the plaintiff introduced evidence tending to prove that on the 23d day of May, 1883, he imported into the port of New York, by the ships Charles H. Marshall and Edith, certain asphaltum in cakes, hereinafter more specifically described, and that there were two sets of paper used upon the entry of this merchandise, one set for each

vessel, which two sets were substantially alike, and the parts of which material to this issue are fairly represented by the set of papers used in the entry of the cargo of the ship Charles H. Marshall, which are hereinafter more at large set out.

The plaintiffs introduced in evidence the entry by the Charles H. Marshall, which thus describes the importation: "12,000 cakes, 300,000 kilograms asphaltum, marks 15,750, 83,749."

The consignee's oath upon said entry is as follows:

"I, H. R. Bradbury, do solemnly and truly swear that the in-
19 voice and bill of lading now produced by me to the collector of the port of New York are the true and only invoice and bill of lading by me received of all the goods, wares, and merchandise by me imported by the Edith, whereof —— —— is master, from Antwerp, for account of any person whomsoever for whom I am authorized to enter the same; that the said invoice and bill of lading are in the state in which they were actually received by me, and that I do not know or believe in the existence of any other invoice or bill of lading of the said goods, wares, and merchandise; that the entry now delivered to the collector contains a just and true account of the said goods, wares, and merchandise according to the said invoice and bill of lading; that nothing has been on my part, nor to my knowledge on the part of any person, concealed or suppressed, whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares, and merchandise; that the said invoice and the declaration are in all respects true, and were made by the person by whom the same pur-
20 port to have been made; and that if at any time hereafter I discover any error in the said invoice or any account now tendered of the said goods, wares, and merchandise, or receive any other invoice of the same, I will immediately make the same known to the collector of this district. And I do further solemnly and truly swear that, to the best of my knowledge and belief, the Neuchatel Asphalt Company, of Neuchatel, is the owner of the goods, wares, and merchandise mentioned in the annexed entry; that the invoice now produced by me exhibits the actual cost or fair market value at Neuchatel of the said goods, wares, and merchandise, all charges thereon, and no other or different discount, bounty, or drawback but such as has been actually allowed on the same.

(Signed)

H. R. BRADBURY.

Sworn to this 23rd day of May, 1883, before me.

W. F. WARREN,
D. Collector.

The plaintiff further introduced in evidence the invoice upon
21 which the said entry is based (which invoice will for brevity be hereinafter described as the consular invoice), the material portion of which invoice is as follows:

"A quantity of asphaltum, 300,000 kilograms, at 52.50 marks per 1,000 kilograms, 15,750, marks. Free on board Antwerp."

There was attached to this invoice on making entry and when produced in evidence a paper purporting to be an invoice of goods by the ship

Marshall (which paper will for brevity be hereinafter described as the supplemental invoice), the material portions of which paper are as follows:

"A quantity of asphaltum, 300,000 kilograms; value at the mines, 34.50 marks per 1,000 kilos., M. 10,350. Freight and charge from the mines to Antwerp. Free on board, at 18 marks per 1,000 kilos., 5,400. Free on board Antwerp, marks 15,750."

Attached to the consular invoice was the oath of the owner of the merchandise, which stated, among other things, that said invoice con-
22 tained the actual cost and quantity thereof (of the goods) and of all charges thereon.

Further, attached to the consular invoice was the certificate of the vice-consul of the United States at Mannheim, which certificate is in the words and figures following:

"I, William Koster, jr., vice-consul of the United States at Mannheim, do hereby certify that at Mannheim, on this 20th day of April, anno Domini 1883, the within invoice, numbered 283, in which are mentioned and described certain asphaltum, amounting with the charges thereon to the gross sum of marks 15,750, was produced to me by , the owner of the goods, wares, and merchandise therein mentioned, who thereupon declared in writing that it was intended to make entry of said goods, wares, and merchandise at the port of New York in the United States of America. I do further certify that I am satisfied that the person making the declaration hereto annexed is the person he represents himself to be; and that the actual market values or wholesale prices of the
23 goods, wares, and merchandise described in the said invoice in the principal markets of the country, and at the time of exportation, are correct and true, except as changed by me and set forth in the column of consular corrections of estimates.

"Witness my hand and seal of office at Mannheim the day and year aforesaid.

"WM. KOSTER,
"*United States Vice-Consul.*"

To the supplemental invoice there was no such consular certificate attached.

The plaintiff further introduced testimony tending to prove that upon the entry of said goods the defendant levied and collected thereon an ad valorem duty of 25 per cent., based upon the value thereof, as set out in the above consular invoice and entry, to wit, 15,750 marks.

The plaintiff protested against this assessment, on the ground that the defendant "assessed duty upon the cost of transportation, shipment, and transshipment, with all expenses included from the place of pro-
24 duction and manufacture to the vessel in which shipment was made to the United States, contrary to section 7 of the act of March 3, 1883," claiming "that said charges were not the subject of appraisement or duty," and he further protested upon the second ground that the invoice price per 1,000 kilograms having been found correct by the appraiser, the defendant had applied the same to a larger quantity than appears by the weigher's return to have been imported; and that he paid the excess of duties exacted under compulsion solely for the purpose of obtaining the goods. Appeal was duly taken to the Secretary of the Treasury, and this action seasonably brought to recover the alleged excess of duties so collected.

ARTHUR W. PATTERSON, who being duly sworn as a witness on behalf of the plaintiff, testified in substance that he was the custom-house broker of the plaintiff. Upon being shown the two invoices above named, that they were both presented at the custom-house on the entry of the merchandise; that he made the entry for the plaintiff; that for this
25 purpose he went immediately upon the arrival of the goods to the custom-house, and asked to make the entry on both the consular and supplemental invoices, the latter as explanatory of the former; that the custom-house officers refused to allow this to be done; that he did not remember the conversation which took place at the custom-house at the time, but that he asked permission to use the supplemental invoice in connection with the other invoice as explanatory, and enter on the net value, charges off, which was refused; and he then entered the goods according to the consular invoice; that the supplemental invoice had come in answer to a telegram to the Nauchatel Asphaltum Company, to furnish a corrected invoice showing what the charges were. And he further testified that subsequently to the entry of the goods a copy of the supplemental invoice was received, properly certified by the consul, which copy was admitted in evidence.

Counsel for the plaintiff here read in evidence the United States weigher's return on the goods imported by the Charles H. Marshall, and the witness testified that the weight entered and the duty paid was 661,380 pounds, and as weighed by the United States weigher it was 658,640 pounds, leaving a deficiency of 2,740 pounds for which no refund
26 of duty had as yet been made; that the United States weigher's return of goods landed from the Edith was a little over 9,000 pounds short of the quantity entered, and duty paid, and no refund has as yet been made to the plaintiff therefor.

This witness further testified that he considered a "free on board" invoice to be one which contains the charges for shipping, package, railroad transportation, &c., until the goods are actually on board the vessel.

Upon cross-examination by counsel for the Government this witness further testified:

Q. If a man sells you goods at a price per pound, or per yard, to be delivered on board a ship, then the way that invoice would be made out would be so many yards at so much a yard, f. o. b., would it not?—A. I should judge that would be correct if it is actually on board the vessel, and he makes no charges of any kind.

Q. What do you say that the words "free on board" mean according to the trade usage and understanding of this invoice by the ship Marshall "free on board, Antwerp;" do you know whether that has any signification in trade?—A. I could not answer.

Q. Do you know whether that form of expression in an invoice
27 of consigned goods has by commercial usage a fixed meaning?—A. I have seen a great many invoices with that word in them; I understand it.

Q. Do you know what the trade understanding of the meaning of those words is?—A. I can't say that I do; no, sir.

JOHN V. VAN ARSDALE, a clerk in the custom-house, produced, in answer to a subpœna to the defendant, certain papers which were read in evidence, and among which was the letter of the decision of the Secretary of the Treasury on plaintiff's appeal from the decision of said defendant, of which letter the following is a copy:

TREASURY DEPARTMENT,
Washington, D. C., June 8, 1884.

COLLECTOR OF CUSTOMS,
New York:

Sir: This Department is in receipt of your letter of the 21st ultimo, transmitting appeals (I, 6695 and I, 6778) of Mr. H. R. Bradbury from your decision assessing duty on certain charges in connection with merchandise imported subsequent to March 3, 1883, per S. S. Charles H. Marshall and S. S. Edith, May 21 and July 23, 1883, respectively,
28 from Antwerp.

"The merchandise consisted of asphaltum invoiced f. o. b. at Antwerp. The total invoice value was declared on the entries by the importers, and the appraiser's return on the invoice reads:

"Asphaltum, 25 per cent. Correct.

The appraiser's report shows that the invoice contained in each instance two items, one being the value of the merchandise at the mines, and the other the cost of freight and charges from the mines, where the goods were purchased, to Antwerp for shipment to the United States.

The protest relates to the duties levied on the item last mentioned. The entry was liquidated July 25, 1883.

In the Department letter of June 4, 1883 (S. S. 5748) it was stated that many parties, in their endeavors to protect their rights by not paying duties on non-dutiable charges, under the act of March 3, 1883, have been led to deduct in the entry proper items for charges which the appraiser has returned as belonging to the value. Relief in those cases was therefore afforded. The facts in the present case, however, are different, and the Department sees no good ground on which to base any
29 authority for relief from the payment of duties on the value specified in the entry. Your decision is therefore affirmed.

Very respectfully,

H. F. FRENCH,
Ass't Secretary.

(Signed)

WILLARD C. POTTER, being sworn and examined as a witness in behalf of the plaintiff, testified in substance that he was an examiner in the appraiser's department at the port of New York; that he passed the entry in question; that his endorsement "Correct," signifies that the value as stated upon the entry is sufficient to cover the market value of the merchandise and nothing more.

Q. Will you state whether in the case of this entry you ascertained the market value of these goods?—A. I did, sir.

Q. What was it?

(Counsel for the Government objected to the question as being irrelevant, incompetent, and immaterial. The court overruled the objection of the defendant, to which ruling defendant's counsel excepted; which exception was duly allowed.)

Ans. I found from memory and by comparison with other goods in the same markets that the market value of these goods was 34
30 marks and 50 pfennings or 35 marks at the mines at the place of production.

Q. Will you state whether or not you have passed as a rule invoices of asphaltum from Mannheim, Germany, for a considerable period before and after that time at the same rate of 34.50?

(Counsel for the Government objected to the system upon the same grounds, which objection was overruled by the court, to which ruling the counsel for the Government excepted; which exception was duly allowed.)

Ans. That would be impossible to say without the papers. I presume that that is about the market value.

Upon cross-examination by defendant's counsel the witness testified substantially as follows:

If I had found the market value of the asphaltum to have been 32 marks 50 pfennings per thousand kilograms or 40 marks per thousand kilograms or 20 marks per thousand kilograms my return would have been the same; that is to say, I would have made the same indorsement, "Correct," provided the value as entered covered the market value. The return "Correct" in this case means that the amount 15,750 marks
31 was sufficient to cover the market value; merely that the market value was not greater than that amount. I have no recollection as to what I found the market value of this importation to be independent of what is written upon the entry and invoice.

Q. Have you any recollection at all of what you did, in fact, find the market value in the principal foreign ports to be?—A. Yes; I have that recollection, because it is so stated on the invoice (supplemental) that 34 marks 50 pfennigs per thousand kilograms was about the usual price, and it seems to have been stated there on the invoice.

Q. Then, as I understand, the effect of your testimony is that from looking at the supplemental invoice you form the impression that the value at that time at the mines was 34 marks and 50 pfennigs per thousand kilograms?—Ans. Yes, sir.

Q. Do you have any recollection that you found that as a fact in respect to this importation?—A. In regard to this particular importation my mind is blank. I think that the asphaltum that is commercially dealt in is not in the same condition as when taken out of the earth at the mines. I think it is compressed after being taken out. It is caked simply
32 for convenience. To put it in a convenient form for shipment it is either put in cakes or in some mold form that gives it a convenient form for shipment. I do not know whether Neuchatel is a market for asphaltum; it may be so, but there is no asphaltum mined there.

AUGUSTUS STANLEY, being duly sworn and examined as a witness on behalf of the plaintiff, testified in substance as follows:

I am liquidating clerk at the custom-house. In the case of the entry by the Edith there seems to be a difference of 9,000 pounds between the quantity as it appears by the entry and the quantity landed as it appears by the weigher's return. In the case of the entry by the marshal, there is a difference of 2,740 pounds.

(To sustain the issue upon the part of the defendant the counsel for

the defendant offered in evidence the "triplicate invoices" of these importations, which were exact copies of the invoice heretofore described as the consular invoice, and the same were admitted in evidence.)

The defendant produced as a witness HART E. ESTERBROOK, who,
33 being duly sworn, testified that he was chief liquidating clerk of the New York custom-house; that he had held that position since 1872; that he was familiar with the laws requiring that duty shall not be taken on less than entered value; that according to the course of business in the custom-house under that law the entered value is the value declared upon the entry under oath; that is, upon the document heretofore described as the entry, upon which the entered value is described (as the entry, upon which the entered value is described) to be 15,750 marks, and that the practice at the custom-house under that law is that the collector shall not levy duty on less than the entered value. This is so, barring clerical errors, even though the amount in the invoice were less than the amount set out upon the entry.

Upon cross-examination by the counsel for the plaintiff the witness testified in substance that charges as such are not recognized by the officers of the New York custom-house; that they have nothing to do with charges; that the duty is levied upon the entered value; that the entered
34 value is the value of the merchandise sworn to on the entry; that at the time of entering the goods if the invoice exhibits the charges the importer has the right to take them from the invoice value and to enter them; that having entered them and having made oath to the entry and declaring the entered value, it is the practice of the custom-house, under the law referred to, to levy duty upon that entered value.

Q. You say that no deduction can be made from the entered value. Are you sure of that?—A. I am positive.

Q. Now, if it appears that goods have sustained damage on the voyage of importation, does the collector not make allowance for that?—A. Yes; if it is properly claimed within the statutory time; there is a special provision of law for that case.

Q. If a cargo of sugar is invoiced at 600,000 pounds, valued at $600,000, and if it should appear by the weigher's return that there were only 500,000 pounds valued at $500,000 when it landed, would you take the duty on the 500,000 pounds valued at $500,000?—A. The law provides that the duty shall be assessed at so much per pound on sugar; of course the weigher's return determines the quantity in that case. That is
35 only the appraisement of quantity. It is different in the appraisement of value.

"Q. Then you are guided in instances of quantity by the weigher's return?—A. On goods that are subject to specific duty, yes; on goods that are subject to ad valorem duty, no."

NATHANIEL GEORGE, being duly sworn and examined as a witness on behalf of the defendant, testified that he was refund clerk in the naval office of the New York custom-house, and had held that position for about five years; that his duty is that of liquidating the duty; that the entered value is the value which the importer places upon the document called the entry, and swears to as the value of the goods.

The counsel for the Government thereupon moved for the direction of a verdict in favor of the defendant upon the grounds:

1. That the evidence does not show that the duty was exacted in the case of either importation on any amount in excess of the invoice value.

2. That the evidence does not show that the duty was exacted in the case of either importation on any amount in excess of the entered value.

36 3. That the evidence does not make out a case of recovery for the plaintiff.

The court denied the motion of the defendant, the counsel for the defendant excepted to this ruling, which exception was duly allowed.

Counsel for the defendant made a separate request to the court to charge to the jury each of the following propositions:

I.

That by force of section 2900 of the Revised Statutes no duties were unlawfully exacted in this case unless taken on an amount in excess of the invoice value.

II.

That by invoice value is meant the amount stated in the consular invoices, namely, 52 marks and 50 pfennings per 1,000 kilograms of asphaltum, and that the collector was bound by law not to take duty on a less amount than would be obtained by applying that rate of 52 marks and 50 pfennings to the quantity of asphaltum imported as determined by the official weigher.

III.

That by law no duties were unlawfully exacted in this case
37 unless taken on an amount in excess of the entire value.

IV.

That by entered value, with reference to each importation in this case, is meant the amount per kilograms which would be found by dividing the amount stated as the value in the written entry pertaining to such importation by the number of kilograms stated in the same written entry, and that the collector was bound by law not to take duty on a less amount than would be obtained by applying the value per kilograms so found to the quantity of asphaltum imported as determined by the official weighers.

V.

That, no changes being specified in the consular invoices, the defendant would not have been justified in the assessment of duty in making any deduction whatever for charges from the amount stated in the consular invoices.

VI.

That, no charges being specified in the written entries, the collector would not have been justified in the assessment of duty in making any deduction whatever for charges from the amount stated in the written entries.

38

VII.

That the invoices containing items for value at the mines, and for freight and charges from the mines to Antwerp (which invoices on the evidence came to this country separate from the consular invoices, and were attached to the consular invoices here), do not furnish any basis for a recovery by plaintiff, inasmuch as value at the mines is not an expression of any of the statutory standards of dutiable value, and the expression freight and charges from the mines to Antwerp may include items that are proper elements of dutiable value, such as the cost of moulding the asphaltum into cakes after it was mined, and of putting it into the condition in which it was imported.

VIII.

That the reports of the appraiser endorsed upon the invoices do not furnish any basis for a recovery by the plaintiff inasmuch as, upon the evidence, it must be taken that these reports are not a finding of what the market value was, but as a finding only that the entrie value, as stated in blue ink by the entry clerk upon each invoice, was sufficient to cover market value.

39

IX.

That in no aspect can the testimony of Mr. Potter, the examiner in the appraiser's office, be regarded as furnishing a basis for recovery by the plaintiff, inasmuch as his estimate was an estimate of value at the period of exportation, and there is no legal connection between such value and the value which the law requires to be stated in an invoice, namely, market value at the time and place of manufacture or procurement, if the merchandise was obtained otherwise than by purchase, or actual cost if it was obtained by purchase.

X.

That the plaintiff is not entitled to recover anything in respect to the difference between the weights stated in the invoices and entries and the weights stated in the official weigher's return.

XI.

That the statements in each of the entry oaths concerning the invoice must be construed as referring only to the consular invoice, and the collector would not have been justified in applying them to the unauthenticated invoice attached by the importer to the consular invoice.

XII.

40 That the plaintiff is not entitled to recover anything in respect to his claims on charges, because the evidence shows that no duty was taken on charges as such, but was taken on the entry value as the collector understood it, and if such understanding was, in any respect, erroneous the error is not pointed out in the protest.

XIII.

That plaintiff can not recover unless the jury are satisfied that he brought to the attention of the collector the fact that he desired an appraisal under R. S., sec. 2926, and was refused.

XIV.

As to the conversation between Mr. Quackenbush, the entry clerk, and Mr. Patterson, if it means no more than this: that Mr. Patterson applied to be allowed to make up his entry according to the authenticated invoice, making the deduction in the entry of the items stated in that invoice for charges, and was refused, then plaintiff can not recover in respect of his claim on charges.

41 The court charged the jury as follows:

WHEELER, J.:

"This cause, gentlemen, is to be left to you. Now, it is claimed in behalf of the defendant that where there is an invoice of goods made out by the importer on which the goods were entered, the custom-house is not at liberty to take duty for any less amount than that specified in the invoice. That, I think, is true, where the invoice specifies the dutiable value of the goods; but where it does not, then another course is to be taken. Now, you have seen these invoices. When I speak of invoices, I mean the invoices certified by the consul, not this addition that is put upon them; you have seen those. Those invoices say that they express the value of these goods free on board. Now, you have heard the testimony of Mr. Patterson, and he is the only witness as to what is the understanding when an invoice is made of goods specifying their value free on
42 board. When charges were dutiable, if free on board include charges, that would be just right.

"When charges cease to be dutiable, if free on board included charges, it wouldn't be right. Now, if the understanding of the custom-house and its course of business, and the understanding of the importers, and as between them was such that an invoice like this of the value of the goods free on board meant that they included charges, the charges of transportation and placing on board ship, charges from the markets of the country to the ship, if they were included in such an invoice as that and would be understood to be so, then this was not an invoice of dutiable value, but an invoice of the goods including charges, an invoice of the goods at a value which included not a mere value of the goods of the particular market, but the charge of transportation also. If that was it, then it was an incomplete invoice, and one which ought to be treated in another way. Now, I

leave that to you to say, to answer the question whether this invoice meant that or not, whether it meant the value of the goods in the princi-
43 pal markets of the country including charges. If it meant the latter, then the question is, whether the importer took the proper course to get relief. Now, he might go when he made his entry and claim that his invoice was not complete, and that he wanted the goods appraised or wanted to amend his invoice. Now, you have heard Mr. Patterson testify as to what occurred when he presented this invoice to the entry clerk, and I think he is the only witness who has testified about that. Now, if he was given to understand when he presented that invoice there and stated that he wanted to get the charges out in some way and presented this additional paper—you heard his testimony about what he did—if he was given to understand that he must enter those goods at the value expressed; that is, the value including the charges, the value expressed in the invoices, and in no other way, and that they couldn't get along in any other way than that, then he wasn't bound to ask for an appraisement. If they gave him to understand that that was the only thing he could do, if they met him right there when he wanted to put in this additional invoice, and said the only thing you can do is to enter these goods at this
44 value, and the importer was compelled to do it in order to proceed at all, and he yielded to that, then he was not bound to say anything about an appraisement. But if they did not do that, if they just merely refused that and gave him a chance to ask for an appraisal if he wanted to, and he didn't ask for it, he mistook his remedy, and the plaintiff can not recover, and it was his fault that he didn't enter them right. But if they cut him right off on that subject and said he must enter at this larger value, then it was their fault, and the plaintiff can recover if duties on charges were collected.

"Now, as to that you have the testimony of Mr. Patterson, and these papers, and the testimony of this appraiser—examiner, who has told you about that. He did appraise these goods. Now the goods are to be appraised at a value in the condition in which they are shipped in the principal markets of the country from which they came, in the condition in which they are shipped. These were cakes of asphaltum in the princi-
pal markets from which they came. Now, you have heard his testi-
45 mony and have heard the description of the goods. Now he says he appraised the value. He is a custom-house examiner. If you understand from his testimony that he appraised the value in the principal markets of the country in the shape in which they were, that is, in these cakes at thirty-four marks and fifty pfennings, if that is what he appraised that was the real dutiable value; then the custom-house exacted a duty in excess for charges, which would be charges; they didn't call it charges, but it would be charges. If you find that, and you find these other facts in favor of the plaintiff, then the plaintiff should recover for what he has paid for this duty on charges, because the law of 1883 took out charges as a part of the dutiable value. Before that they added the charges of transportation from the principal markets *markets* of the country to make dutiable value. The law of 1883 repealed that. The custom-house is bound to follow that law. They ought not to take duties on charges unless they were compelled to by the course of the importers. Now, if they have got a duty on it, charges, it ought to be taken off unless

the course of the importer was such that they couldn't help taking duty on charges. If you find all these facts in favor of the plaintiff then
46 you will return a verdict for this sum, which is the duty on charges

"If that wasn't the value that the appraiser or examiner took, when he says he did appraise these goods; if that wasn't the basis, and you can't tell what it was, then you can't tell how much duty was paid on charges. But you have the testimony before you, and you remember what his duties were and what he was doing; then, what he said about it. If that is what he meant, that he appraised this asphaltum as it came to this country at the value in the principal markets of the country where it was produced, which would be the country where the mines are, if that is what he meant, then that will be right. If that is not what he meant, and you can't tell, the plaintiff hasn't made out his case. I think you will understand as to that part of the case.

"I will just restate it. If the invoices show that charges were exacted, then the importer ought to have had a chance to either correct the invoices or have his goods appraised. And if he claimed that right to have the invoice amended, and he was cut right off there by the information
47 that these charges couldn't be reduced, that they had got to be entered at the sum stated in the invoice, then he was not in fault. But if he was given a fair chance to ask for an appraisal and didn't, then he lost it of his own conduct. And if he became entitled to recover back what was taken for charges, he must show what the charges were, and on that the has testimony of Mr. Potter. If Mr. Potter interpreted the law to mean charges valued in the principal markets, then you have that. But if he can't tell, then you can't tell.

"Then there is one other branch of the case, and that is this: Goods were invoiced as weighing so much, and of such a value. They were not dutiable by weight, as I understand it. It wasn't so much weight, and so much value on the unit of weight. That is not it, but so many units of weight at so much value on the whole. Now, when the weigher came to weigh it it fell short in one case, I believe, 9,000 pounds, and in another case less. Now, the plaintiff claims a deduction on that account. He claims that the custom officers should go by the weigher's weight, and recover only in proportion to what the invoice-rate was. As to that, if the goods all got here which were sent, if they arrived here and were appraised at this value, then he is not entitled to any reduction on that score. But if by any means a part of the asphaltum did not get here, but was lost
48 by some cause, no matter how, between the time it started and the time it got here, if it had been lost out, so that the whole of it didn't arrive, then the duties should be paid on what arrived at its proportionate value. If it was a mere shrinkage on the whole of the asphaltum without any loss in any way beyond ordinary shrinkage, then there is to be no reduction on that score. But if some of it was lost out, so that a part of it got away and didn't get here, you should take out that proportion. Now, as the case is presented, if Mr. Potter's basis right, and you find that the plaintiff is entitled to recover, he is entitled to recover $267.75 as duty on charges on the cargo of the Edith, and $321.50 for the duty on charges on the charges of the marshal. I have not been furnished with any computation of interest from time of payment."

Mr. HARTLEY. We can arrive at that hereafter.

The COURT. I think the better way is to state it now, so much. He is entitled to recover interest on it from the time he paid it. But if you are willing to compute it hereafter in case the jury find the plaintiff is entitled to recover they need not add the interest.

49 Mr. CLARKE. We will agree from time of payment as shown on the custom-house papers.

The COURT. "Then as to the loss on this evidence of shrinkage in weight, if the plaintiff is right, on the Edith it would be $12.75; on the Marshall, $3.75; making in all $16.50. Now the whole duty on charges is $589.25, and the whole duty on shrinkage, $16.50.

"Now, if you find a verdict for the plaintiff, I wish you to be prepared to state, when the clerk inquires of you what your verdict is, how much is on shrinkage and how much on charges, so that your verdict will show each when it is entered on the minutes. If you find for the whole, you will say for both. If you find on shrinkage and not on charges, then on shrinkage so much; if you find on charges and not shrinkage, then on charges so much."

Counsel for the defendant thereupon requested of the court a ruling upon the defendant's first request to charge.

The court declined to charge as requested, except as charged.

Counsel for the defendant excepted to this ruling of the court, which exception was duly allowed.

50 Counsel for the defendant thereupon made the same request, separately and respectively, as to each one of defendant's requests to charge, and the court made the same ruling as to each such request, separately and respectively, as that made to defendant's first request to charge; and to each of said rulings the counsel for the Government excepted, each of which exceptions was by the court duly allowed.

The jury returned a verdict for the plaintiff on both claims as set out in the plaintiff's protest. Counsel for the Government moved for a stay of proceedings and a certificate of probable cause; which motion was granted by the court.

And, inasmuch as the exceptions, matters, and things aforesaid could not appear by the record, I have settled, allowed, and signed this bill of exceptions on the prayer of the said defendant, by his counsel; and

It is ordered that the same be filed as part of the record herein, with like force and effect as if the same had been reduced to writing and signed and filed before the case was given to the jury.

Witness my hand this 14th day of May, 1886.

HOYT H. WHEELER.

51 (Indorsed:) N. S. 8809—U. S. circuit court, southern district of N. Y. Henry R. Bradbury versus William H. Robertson, as collector of customs. Bill of exceptions. Stephen A. Walker, United States att'y, attorney for def't.

Due service of a copy of the within is hereby admitted. New York, 188 . att'y for p'lff, to att'y for pl'ff.

U. S. circuit court. Filed May 17, 1886. Timothy Griffith, clerk.

The within bill of exceptions is not opposed, but the text of def't's motion to direct a verdict, his requests to charge, and the charge of the court are not known to us, being matters between the court and defendant's

counsel, and we now only ask the court to carefully examine into the correctness of the same.

HARTLEY AND COLEMAN,
Counsel for Pl'ff.

52 *Assignment of errors.*

Supreme Court of the United States.

WILLIAM H. ROBERTSON, plaintiff in error,
HENRY R. BRADBURY, def't in error.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol in Washington, comes the said plaintiff in error by Stephen A. Walker, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendant.

And the said plaintiff prays that the judgment aforesaid for the error aforesaid, and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, etc.

STEPHEN A. WALKER,
Att'y for Pl'ff in Error.

53 (Indorsed:) United States Supreme Court. William H. Robertson, plaintiff in error, vs. Henry R. Bradbury. Assignment of error. Stephen A. Walker, att'y for pl'ff in error.

Due service of a copy of the within is hereby admitted this 20th day of May, 1886.

HARTLEY & COLEMAN,
Att'y for Def't in Error.

U. S. circuit court. Filed May 20th, 1886. Tim Griffith, clerk.

54 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Henry R. Bradbury, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and eighty-six, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein William H. Robertson is plaintiff in error and you are defendant in error, to show cause, if any there be, why

the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated May 20th, 1886.

ADDISON BROWNE.

55 (Indorsed:) 8809. U. S. Supreme Court. William H. Robertson, plaintiff in error, against Henry R. Bradbury, defendant in error. Citation. Stephen A. Walker, attorney for plaintiff in error.

Due service of a copy of the within is hereby admitted this 20 day of May, 1886.

HARTLEY & COLEMAN,
Att'ys for Pl'ff in Error.

(Stamp:) U. S. circuit court. Filed May 20, 1886. Timothy Griffith, clerk.

(Indorsement on cover:) No. 321. William H. Robertson, collector of the port of New York, plaintiff in error, vs. Henry R. Bradbury, S. New York C. C. U. S. Filed August 19, 1886.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

WILLIAM H. ROBERTSON, collector, etc.,
vs.
HENRY R. BRADBURY.
} No. 58.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE PLAINTIFF IN ERROR.

This is an action to recover back $539.59 with interest, the same being the amount of money alleged to have been illegally exacted from the defendant in error by the plaintiff in error as collector of the port of New York, in the name of duties on two certain importations of asphaltum,

on May 23, 1883, by the ships *Charles H. Marshall* and *Edith.*

As the papers used in the two entries were substantially alike, those relating to the entry of the cargo of the ship *Charles H. Marshall* are, so far as applicable to the questions involved in this writ of error, set out in the bill of exceptions, as presenting the questions relating to both importations.

The plaintiffs introduced in evidence the entry by the *Charles H. Marshall* which thus describes the importation: "12,000 cakes, 300,000 kilograms asphaltum, marks 15,750, 83,749." (R., p. 7.)

The consignee's oath was in the usual form under the tariff act of June 22, 1874, stating, amongst other things, "that the invoice now produced by me exhibits the actual cost or fair market value at Neuchatel of the said goods, wares, and merchandise, all charges thereon, and no other or different discount, bounty, or drawback but such as has been actually allowed on the same." (R., p. 7.)

The invoice upon which the above entry was

based (which is known in the case as the consular invoice) described the merchandise as follows:

> A quantity of asphaltum, 300,000 kilograms, 52.50 marks per 1,000 kilograms, 15,750 marks. Free on board Antwerp.

There was attached to this invoice on making entry and when produced in evidence a paper purporting to be an invoice of goods by the ship *Marshall* (which paper is known in the case as the supplemental invoice). The material portions of this paper are as follows:

> A quantity of asphaltum, 300,000 kilograms; value at the mines, 34.50 marks per 1,000 kilos. M 10,350. Freight and charge from the mines to Antwerp. Free on board, at 18 marks per 1,000 kilos., 5,400. Free on board Antwerp, marks 15,750. (R., p. 8.)

Attached to the consular invoice was the certificate of the consul of the United States at Mannheim, which stated, amongst other things:

> I do further certify * * *, that the actual market values or wholesale prices of the goods, wares and merchandise, described in the said invoice, in the principal markets of the country and at the time of exportation, are correct and true, except as changed by me and set forth in the column of consular corrections of estimates. (R., p. 8.)

But there was no such consular certificate attached to the supplementary invoice.

The entries were made in May, 1883 (pp. 3, 8), and a duty of 25 per cent. ad valorem

assessed and collected thereon, and the plaintiff protested against this assessment on the ground that it was made not only on the value of the merchandise but also "upon the cost of transportation, shipment, and transshipment, with all expenses included, from the place of production and manufacture to the vessel in which shipment was made to the United States, contrary to section 7 of the act of March 3, 1883," claiming "that said charges were not the subject of appraisement or duty," and he further protested "upon the second ground, that the invoice price per 1,000 kilograms having been found correct by the appraiser, the defendant had applied the same to a larger quantity than appears by the weigher's return to have been imported" (Rec., p. 8).

The custom-house broker of the plaintiff testified that he went, immediately on the arrival of the goods, to the custom-house, "and asked to make the entry on both the consular and supplemental invoices, the latter as explanatory of the former;" that is, to enter on the net value charges off, but the request was refused, and so the entry

was made in accordance with the consular invoice. The witness also explained that the supplemental invoice had been sent by the Neuchatel Asphalt Company to correct the consular invoice in reply to a telegram.

The plaintiff's evidence further showed that, according to the weigher's return, the weight of the cargo of the *Marshall*, as entered, was 661,380 pounds, but that it in fact weighed only 658,640 pounds, leaving a deficiency of 2,740 pounds for which no refund of duty had been made. It was also proved that in the case of the other ship, *The Edith*, the weigher's return showed a deficiency of a little over 9,000 pounds, as compared with the weight as entered.

This witness also undertook to interpret the words "Free on board *Antwerp*," in the consular invoice, saying that "*he considered*" a "free on board" invoice to be "one which contains the charges for shipping, package, railroad transportation, etc., until the goods are actually on board vessel" (R., p. 9).

The plaintiff showed by an examiner in the appraiser's department that his entry of "correct"

only meant that the entered value was sufficient "to cover the market value of the merchandise and nothing more." He then went on to say that the market value of the merchandise was 34 marks and 50 pfennigs or 35 marks "*at the mines at the place of production*" (p. 11).

The defendant, the collector, then showed by the liquidating clerk of the New York custom-house that he had held that position since 1872; that according to the course of business in the custom-house and the law "the entered value is the value declared upon the entry under oath; that is, upon the document heretofore described as the entry upon which the entered value is described to be 15,750 marks, and that the practice at the custom-house, under that law, is that the collector shall not levy duty on less than the entered value. This is so, barring clerical errors, even though the amount in the invoice were less than the amount set out upon the entry."

Upon cross-examination the witness said that charges as such are not recognized by the officers of the New York custom-house; "that the duty is levied upon the entered value; that the en-

tered value is the value of the merchandise sworn to on the entry; that at the time of entering the goods if the invoice exhibits the charges the importer has a right to take them from the invoice value and to enter them; that having entered them and having made oath to the entry and declaring the entered value, it is the practice of the custom-house, under the law referred to, to levy duty upon that entered value."

The witness also said that no abatement on account of deficiency in weight could be made where, as in this case, the duty was ad valorem, but that such abatement would necessarily be made in case of a specific duty of so much a pound.

The defendants' counsel then asked the court to direct the jury to find for the defendants upon the grounds—

1. That the evidence does not show that the duty was exacted in the case of either importation on any amount in excess of the invoice value.

2. That the evidence does not show that the duty was exacted in the case of either importation on any amount in excess of the entered value.

3. That the evidence does not make out a case of recovery for the plaintiff. (R., p. 13).

But the court refused so to charge the jury, whereupon the defendant excepted (R., p. 13).

The court then charged the jury (pp. 15–18), and thereupon the defendant requested the court to give in charge to the jury fourteen distinct propositions of law, based on the evidence (p. 13), which the court refused to do, except in so far as it had already charged (p. 18), to which ruling the defendant excepted (p. 18).

The jury returned a verdict for the plaintiff (p. 5) on both claims as set out in his protest.

On May 17, 1886, judgment was entered on this verdict (p. 6).

ASSIGNMENT OF ERRORS.

The judgment is erroneous in this, that the court declined to charge the jury as to the following fourteen propositions of law, or any one of them, that is to say:

I.

That by force of section 2900 of the Revised Statutes no duties were unlawfully exacted in this case unless taken on an amount in excess of the invoice value.

II.

That by invoice value is meant the amount stated in the consular invoices, namely, 52 marks and 50 pfennings per 1,000 kilograms of asphaltum, and that the collector was bound by law not to take duty on a less amount than would be obtained by applying that rate of 52 marks and 50 pfennings to the quantity of asphaltum imported as determined by the official weigher.

III.

That by law no duties were unlawfully exacted in this case unless taken on an amount in excess of the entire value.

IV.

That by the entered value, with reference to each importation in this case, is meant the amount per kilograms which would be found by dividing the amount stated as the value in the written entry pertaining to such importation by the number of kilograms stated in the same written entry, and that the collector was bound by law not to take duty on a less amount than would be obtained by applying the value per kilograms so found to the quantity of asphaltum imported as determined by the official weighers.

V.

That, no charges being specified in the consular invoices, the defendant would not have been justified in the assessment of duty in making any deduction whatever for charges from the amount stated in the consular invoices.

VI.

That, no charges being specified in the written entries, the collector would not have been justified in the assessment of duty in making any deduction whatever for charges from the amount stated in the written entries.

VII.

That the invoices containing items for value at the mines, and for freight and charges from the mines to Antwerp (which invoices on the evidence came to this country separate from the consular invoices, and were attached to the consular invoices here), do not furnish any basis for a recovery by plaintiff, inasmuch as value at the mines is not an expression of any of the statutory standards of dutiable value, and the

expression freight and charges from the mines to Antwerp may include items that are proper elements of dutiable value, such as the cost of molding the asphaltum into cakes after it was mined, and of putting it into the condition in which it was imported.

VIII.

That the reports of the appraiser endorsed upon the invoices do not furnish any basis for a recovery by the plaintiff inasmuch as, upon the evidence, it must be taken that these reports are not a finding of what the market value was, but as a finding only that the entire value, as stated in blue ink by the entry clerk upon each invoice, was sufficient to cover market value.

IX.

That in no aspect can the testimony of Mr. Potter, the examiner in the appraiser's office, be regarded as furnishing a basis for recovery by the plaintiff, inasmuch as his estimate was an estimate of value at the period of exportation, and there is no legal connection between such value and the value which the law requires to be stated in an invoice, namely, market value at the time and place of manufacture or procurement, if the merchandise was obtained otherwise than by purchase, or actual cost if it was obtained by purchase.

X.

That the plaintiff is not entitled to recover anything in respect to the difference between the weights stated in the invoices and entries and the weights stated in the official weigher's return.

XI.

That the statements in each of the entry oaths concerning the invoice must be construed as referring only to the consular invoice, and the collector would not have been justified in applying them to the unauthenticated invoice attached by the importer to the consular invoice.

XII.

That the plaintiff is not entitled to recover anything in respect to his claims on charges, because the evidence shows that no duty was taken on charges as such, but was taken on the entry value as the collector understood it, and if such understanding was, in any respect, erroneous the error is not pointed out in the protest.

XIII.

That plaintiff can not recover unless the jury are satisfied that he brought to the attention of the collector the fact that he desired an appraisal under R. S., sec. 2926, and was refused.

XIV.

As to the conversation between Mr. Quackenbush, the entry clerk, and Mr. Patterson, if it means no more than this: that Mr. Patterson applied to be allowed to make up his entry according to the authenticated invoice, making the deduction in the entry of the items stated in that invoice for charges, and was refused, then plaintiff can not recover in respect of his claim on charges.

The court charged the jury contrary to each and every of the aforegoing requests.

ARGUMENT.

The discussion of several general propositions of law will do away with the necessity of giving particular attention to each one of the assignments of error.

In the first place, the action of the collector in assessing the duties on the entered value, including charges, was proper, because at the time the duties were levied and collected the act of March 3, 1883, declaring certain charges non dutiable had not gone into effect.

That act declares (§6) "that on and after the

first day of July, eighteen hundred and eighty-three, the following sections shall constitute and be a substitute for Title Thirty-three of the Revised Statutes of the United States."

Among "the following sections" thus referred to is section 7, which repeals sections 2907 and 2908, Revised Statutes, and declares that "*hereafter*" none of the charges imposed by the repealed sections shall be dutiable. As the duties in this case were levied and paid in May, 1883, they were governed by the tariff of 1874, there being nothing in the act of 1883 to show an intention to make section 7 operative immediately.

But, if this view can not be sustained, it was the plain, unavoidable duty of the collector to assess the duty on the entered value of the merchandise, supported by the consignee's oath accompanying the document constituting that entry. There being nothing in the entry or the consular invoice to enable the collector to separate the amount of the charges there was no alternative to the course taken by the collector.

This court has so held in Oberteuffer *v.* Robertson, collector, etc. (116 U. S., 499, 516), a case

that arose under the tariff of 1883. In that case Mr. Justice Blatchford, speaking for the court, said:

> As to the one case of hosiery, the addition to the entered value of thirty pfennigs per dozen for the cartons and packing was unauthorized, and the goods were dutiable at only the entered value of 1,492 marks. As under § 2900 of the Revised Statutes, duty cannot, as to the goods, "be assessed upon an amount less than the invoice or entered value," whatever is put down in the invoice and entry as the value of the goods *per se* cannot be diminished, *although in fact there may have been included in such value the cost of cartons and packing, unless the invoice or entry shows distinctly what such cost was, and that it was included.* In fact, *the cartons and packing were included twice,* as to the one case of hosiery, in exacting duties, but only that which the appraiser added for them can be deducted, *although their cost would not properly have been part of the dutiable value if the invoice and entry had not stated the value of the goods at a price which in fact included the cost of the cartons and packing.*

It is to be remarked that the consul, in his certificate attached to the invoice, states that he is satisfied that the value stated in the invoice answers correctly to the market value of the merchandise in the principal markets of the country at the time of exportation (p. 8).

It is true there was evidence tending to show that the importer, at the time he entered the merchandise, called the attention of the customs officer to the supplemental invoice and requested to be allowed to avail himself of it in making the entry, for the purpose of separating the charges

of various kinds from the real value of the merchandise.

This request was properly refused, for it is not perceived how this supplemental invoice could have been considered at the custom-house in view of sections 2854 and 2855, Revised Statutes, which require that *all* invoices shall be accompanied by a declaration as to value by the owner and a certificate of a consul of the United States, which authentication was, as we have seen, wholly wanting in the supplemental invoice.

Now, as the consular invoice had failed to furnish the means of separating the value of the merchandise from that of the charges, it was of prime importance that any additional invoice intended to furnish the data for that purpose should be strictly authentic and have written upon it the owner's declaration as to value etc., and appended to it the consul's certificate, as required by law.

If the importer has willfully intermingled in his invoices the values of the merchandise and the charges thereon, and the confusion, thus produced, is hopeless, there is no alternative to levy-

ing the duty on the confused mass, as this court held in Oberteuffer v. Robertson (*supra*).

As Blackstone tells us (2 Comm., 405), if one cast his gold into another's smelting pot, where it enters into the mass already there, he can not reclaim it because he has, by his own act, deprived himself of the ability to identify it. And this is precisely the case here. The confusion of values is the work of the importer, who was bound to know the customs laws of the country into which he was sending the merchandise, and if he has allowed the duties to be assessed without being able to point out what part of the invoice value was not dutiable as charges, he has himself, alone, to blame. By this confusion of values he has lost the right to the exemption of the law as to charges, and must submit to have the duty assessed upon the whole compounded sum, for the collector has no authority under section 2900, Revised Statutes, to go below the entered value for the basis of his assessment.

But there is another reason why the supplemental invoice should have been disregarded.

As the asphaltum was manufactured—crude

asphalt being entitled to free entry—the supplemental invoice should have stated its value *at the time and place of manufacture*, whereas it only states "*value at the mines.*" This, it is submitted, would not have been sufficient if it had been stated in the consular invoice.

Clearly, then, the only way in which the importer could have escaped from his embarrassment was by demanding a re-appraisal, for it was the appraiser alone who could determine the essential fact of the value of the merchandise.

No obstruction was placed in the plaintiff's way to taking this course and his failure to avail himself of the means of redress provided by law is a misfortune in no way caused by what was done at the custom-house.

It is to be observed that this case stands on a different footing from Oberteuffer *vs.* Robertson, because in that case the duty was *assessed* on charges *nominatim*, in direct disregard of the law, whereas in the case at bar the duty was levied on a sum said to contain, to some unknown extent, the value of charges, as well as the value of the merchandise to which those charges were

incident. Manifestly, a re-appraisment was the only way to get at the true dutiable value.

It is to be noted, also, that all that was done by the appraiser was to indorse "*correct*" on the entry, by which he says he meant not to indicate a regular appraisement of the merchandise, but only that the entered value was sufficient *to cover the market value* (p. 10).

But even the supplemental invoice is not satisfactory in respect of the item of charges, for the expression "freight and charges from the mines to Antwerp," may include charges that are clearly dutiable, *as, for instance, the cost of molding the asphaltum into cakes after it was mined, and of putting it into the condition in which it was imported.* It would, therefore, have been improper, on this additional ground, for the collector to take the supplemental invoice into consideration in computing the duties.

THE POINT AS TO DEFICIENCY IN WEIGHT.

As we have seen, the collector refused to deduct from the entered value an amount proportioned to the deficiency of weight as shown by

the weigher's report. This, we are told by the liquidating clerk at the custom house where the entry was made, was in accordance with "*the practice of the custom-house under the law referred to*" to levy duty upon the entered value, unless the law provides that the duty shall be assessed at so much a pound, "of course the weigher's return determining the quantity in that case. That is only the appraisement of quantity. It is different in the appraisement of value." And in answer to the plaintiff's question, "Then you are guided in instances of quantity by the weigher's return?" he replied, "On goods that are subject to specific duty, yes; on goods that are subject to ad valorem duty, no" (Rec., p. 12).

Now here we see a practice of assessing duties ad valorem, regardless of deficiency in quantity, existing in the principal custom-house in the country, notwithstanding the doctrine laid down in Marriott *v.* Brune (9 How., 619), where it was held that a cargo of sugar dutiable at 20 per cent. ad valorem should have been assessed by the collector after making allowance for a deficiency in the merchandise caused by drainage

and waste. The same doctrine is laid down in other cases (17 Fed. Rep., 231; 13 How., 488).

In these cases it is held that allowance for deficiency can be made without impairing the force of the statutory requirement that the duty shall not be assessed upon an amount less than the invoice or entered value, because it is no more than the application of the invoice or entered *price*, which is held to be the equivalent of "*value*," to the actual quantity of merchandise introduced into the country.

The return, then, in the administration of the customs laws to the practice that was abolished by this court in Marriott *v.* Brune (*supra*) may have been the result of the change in the law introduced by the act of March 3, 1863 (12 Stat., 737, and section 2854, Revised Statutes), which prescribes that the declaration of the purchaser, manufacturer, owner, or agent required to be indorsed on the invoice at or before the merchandise is shipped shall specify the "actual quantity" of the merchandise "*if subject to specific duty.*"

Now if, under this law, brandy, for example, was subject to an ad valorem duty of 100 per cent.,

as was formerly the case, the declaration on the invoice need not specify the actual number of gallons contained in the packages mentioned in the invoice, for the reason that the duty is assessed on the presumption that the contents of the packages are in fact up to the values given in the invoice. This is the importer's matter and the Government has no interest in it, and if he do not see to it, then he must bear the loss.

But where the duty is *specific*, as, for instance, so much per gallon or per pound, *the actual quantity concerns the Government*, and, accordingly, the Government looks after it by requiring the declaration on the invoice to specify "*the actual quantity*" of the merchandise.

This suggestion as to the possible effect of the act of March 3, 1863 (*supra*), is made with a full appreciation of the difficulty growing out of section 2921, Revised Statutes, re-enacting a provision in the act of August 30, 1842 (15 Stat., 564), requiring appraisers to report to the collector any deficiency discovered on opening a package, that it may not be included in the assessment of duties.

NO ACTION LIES IN SUCH A CASE AS THIS.

It will be observed that the evidence shows no duress whatever, and that the payment of the duties was purely voluntary.

The denial to the consignee of the right to resort to the supplemental invoice to show the non-dutiable charges should have been followed by a demand for a re-appraisal, and the failure to make such demand was an abandonment of the form of redress provided by the law. And so long as the right to make that demand was not denied it is difficult to see how the payment of the duties was other than voluntary.

The importer was bound to know the law, and he can not establish a case againt the Government on the foundation of his ignorance of the customs laws.

It is respectfully submitted that the judgment should be reversed.

WM. A. MAURY,
Assistant Attorney-General.

APPENDIX.

REVISED STATUTES.

SEC. 2854. All such invoices shall, at or before the shipment of the merchandise, be produced to the consul, vice-consul, or commercial agent of the United States nearest the place of shipment, for the use of the United States, and shall have endorsed thereon, when so produced, a declaration signed by the purchaser, manufacturer, owner, or agent, setting forth that the invoice is in all respects true; that it contains, if the merchandise mentioned therein is subject to ad valorem duty, and was obtained by purchase, a true and full statement of the time when and the place where the same was purchased, and the actual cost thereof, and of all charges thereon; and that no discounts, bounties, or drawbacks are contained in the invoice but such as have actually been allowed thereon; and when obtained in any other manner than by purchase, the actual market value thereof at the time and place when and where the same was procured or manufactured; and, if subject to specific duty, the actual quantity thereof, and that no different invoice of the merchandise mentioned in the invoice so produced has been or will be furnished to any one. If the merchandise was actually purchased the declaration shall also contain a statement that the currency in which such invoice is made out is the currency which was actually paid for the merchandise by the purchaser.

SEC. 2855. The person so producing such invoice shall at the same time declare to such consul, vice-consul, or commercial agent the port in the United States at which it is intended to make entry of merchandise; whereupon the consul, vice-consul, or commercial agent shall indorse upon each of the triplicates a certificate, under his hand and official seal, stating that the invoice has been produced to him, with the date of such production, and the name of the person by whom the same was produced, and the port in the United States at which it shall be the declared intention to make entry of the merchandise therein mentioned. The consul, vice-consul, or commercial agent shall then deliver to the person producing the same one of the triplicates, to be used in making entry of the merchandise; shall file another in his office, to be there carefully preserved; and shall, as soon as practicable, transmit the remaining one to the collector of the port of the United States at which it shall be declared to be the intention to make entry of the merchandise.

ACT MARCH 3, 1883 (22 Stat., 488).

SEC. 6. That on and after the first day of July, eighteen hundred and eighty-three, the following sections shall constitute and be a substitute for Title thirty-three of the Revised Statutes of the United States:

* * * * * * * * *

SEC. 7. That sections twenty nine hundred and seven and twenty nine hundred and eight of the Revised Statutes of the United States, and section fourteen of the act entitled "An act to amend the customs revenue laws, and to repeal moieties," approved June twenty-second, eighteen hundred and seventy-four, be, and the same are hereby, repealed, and hereafter none of the charges imposed by said sections or any other provisions of existing law shall be estimated in ascertaining the value of goods to be imported, nor shall the value of the usual

and necessary sacks, crates, boxes, or covering, of any kind be estimated as part of their value in determining the amount of duties for which they are liable: *Provided*, That if any packages, sacks, crates, boxes, or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the *bona fide* transportation of goods to the United States, the same shall be subject to a duty of one hundred per centum ad valorem upon the actual value of the same.

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Office Supreme Court, U. S.
FILED
NOV 1 1889
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

October Term 1889.

WILLIAM H. ROBERTSON,
Pl'ff in Error,

vs.

HENRY R. BRADBURY,
Def't in Error.

No. 58.

Brief for Defendant in Error.

Prior to the passage of the Tariff Act of March 3, 1883, *ad valorem* duties were levied on the "*dutiable value*" of the import which was determined by the collector from two elements: 1st. The foreign market value of the goods as determined by the U. S. Appraiser, whose finding is conclusive, unless modified on appeal to merchant appraisers. 2d. Charges added to this appraised value by the collector. These charges were the subject of protest, appeal and suit (R. S. § 2931), and were not final like appraised values nor subject to the appraiser's jurisdiction.

Section 2900 Rev. Stats., allowed an importer to add to the value of his invoice when entering his goods to avoid penal duties, and while the section says that duty shall "not be assessed upon an amount

less than the invoice or entered value," such value has been held to be, as the section says: "Wholesale *price*" or foreign market value. To this then was to be added the charges under §§ 2907 and 2908.

As a matter of convenience under the old system many invoices merged the price or value and the charges together into what was called a "*free on board*" price or value, and this was a recognized and established practice, (see appendix) and really stated "dutiable value" as the law then was.

Upon the passage of the act of March 3, 1883, § 7, of which repealed the duty on charges and forbade their estimation by the customs officers for duty "free on board," invoices were no longer applicable, and yet for a long time after the passage of the act, they continued to arrive, until the knowledge of the new law reached our consuls abroad and the foreign merchants whence these invoices proceeded.

In this changing state of affairs the defendant in error received an invoice from Neuchatel, in Switzerland, where the goods were produced, reading "a quantity of asphaltum, 300,000 kilogrammes at 52.50 marks per 1,000, kilogrammes 15,700 marks. Free on board Antwerp." The goods were shipped to the United States from Neuchatel in Switzerland via. Antwerp in Belgium, and thence by sailing vessel to this country.

Finding that this invoice did not conform to the new statute the consigee telegraphed for corrected invoices showing the value of the goods per se. and the charges separately, so that the duty should be paid on the goods alone exclusive of charges. Having received his amended explanatory invoice he presented both as in duty bound at the Custom

House, and claimed the right to enter and pay duty on the goods on their value per se. exclusive of charges, offering to do what was necessary. This and all other relief whatever was refused him, and as the jury have found, to whom this issue was submitted, he was compelled against his will, and in order to get his goods to enter and pay duty on them at the higher figures of the original invoice, and to pay duty on the charges included therein.

But for his own protection and in compliance with his entry oath, he attached the two invoices together, and both went before the appraiser who marked them "correct," and testified at the trial that the foreign market value of the asphaltum was at the mines 34.50 marks (Record, Fol. 30), which was the price stated in the corrected invoice.

It is to be noted of this entire transaction that at every step charges were shown and known to be included in the amount of the compulsory entry and payment of duties. First by the entry oath administered by the Deputy Collector of Customs, who transacted the business; "that the entry now delivered to the collector of customs contains *a just and true account* of the said goods, wares and merchandise *according to the said invoice*" (Record, Fol. 19), and also, "that the invoice now produced by me exhibits the actual cost or fair market value at Neuchatel of the said goods, wares and merchandise, *all charges thereon, etc.* Second, by the consular attestation to the invoice "amounting, *with charges thereon*, to the gross sum of marks 15,750." (Fol. 22 of Record.) Third, by the appraiser's report noted in the decision of the Secretary of the Treasury. (Record, Fol. 28.)

Thus it is manifest that every one of these government officers had actual knowledge at the time he was acting in this matter that the entry and invoice on which the duties were levied and paid under compulsion *included charges*, and *that duty had been paid on such charges*.

As to the transportation charges from an interior foreign country, to an exterior seaport upon goods destined to the United States, like those in this case from Neuchatel, in Switzerland, to Antwerp in Belgium, this court has held that under the law existing prior to March 3, 1883, they were exempt from duty.

Robertson vs. *Downing*, 127 U. S., 607;
Rev. Stats. § 2905;
Grinnell vs. *Lawrence*, 1 Blatch. 349, Middle.

So whether the act of March 3, 1883, was in force or not these charges were not dutiable.

The statute applicable to all charges at the time of these importations is § 7, act March 3, 1883, 22 Stat. p. 523.

"That sections 2907 and 2908 of the Revised Statutes of the United States, and section 14 of the act entitled, An act to amend the customs revenue laws and to repeal moieties approved June 22, 1874, be and the same *are hereby repealed*, AND HEREAFTER none of the charges imposed by said sections, or *any other* provisions of existing law *shall be estimated in ascertaining the value of goods to be imported*. Nor shall the value of the usual and necessary sacks—&c.,

&c. *be estimated as part of their value* in determining the amount of duties for which they are liable."

The Custom House theory and practical administration of this statute has been that the duty on charges continued under the new act, unless the importer took active steps to relieve himself from it That the customs officers had no duty to perform in the premises except to *grant the exemption if claimed and proved.* It seems never to have occurred to them that the statute had laid a direct injunction on *them as officers* taking away their former powers and forbidding them to exercise such power for the future.

The law involved a general public policy for the uniform valuation of imports throughout the country upon which, not only was revenue based, but the *statistics of our entire foreign commerce.*

There is an absolute repeal of the authority to collect duty on charges where they can be identified. This leaves the officers *powerless* to collect them. Second, the statute affirmatively declares that hereafter *none* of the charges *shall be estimated* in ascertaining the value of goods to be imported. This makes the officers actors in the exclusion of any charges that can be identified.

It is no excuse for the non-performance of such official duty to claim that earlier procedure statutes like R. S. 2900 were not specifically altered to conform to the new law. The purpose of the new act being clear if there was any incompatibility between the acts, the old yielded to the new.

Contrary to his statutory duty by duress of goods the Collector obliged an unwilling importer, in order

to escape a greater evil, to use the invoice prepared by a foreigner ignorant of our change of law, as the basis of entered value, although it stated that it contained charges prohibited by law, and he refused to consider the explanatory invoice and refused all relief whatever and did what the *law* said he should *not* do, refusing to remedy the matter on the protest of the importer; leaving him to his action at law in which he has thus far prevailed.

Why should he not prevail here?

Oberteuffer vs. *Robertson*, 116 U. S., 499, does not conflict with our claim. One invoice in that case stated the value of the goods as 1,492 marks, *certain charges having been first deducted.* (page 501 near top to middle.) The 1,492 marks really included the value of cartons, but there was *nothing on either invoice or entry to show it;* and as *charges* had already been deducted, the Collector might well have inferred that *all* the charges were deducted. The court held on that invoice that whatever was there put in the invoice and entry as the *value of the goods per se.*, could not be diminished though in fact it included cartons.

But here, although acting under *duress* in making the entry (which would prevent the application of the Oberteuffer restriction in any case—we having claimed to enter in accordance with the rule there stated), the importer did not in his entry declare the value of the goods *per se*, but the value "*free on board*" as stated in the invoice, and he did state in his entry oath that this sum included charges, and he did file his entry papers in the only way left to him, by *attaching* the supplemental invoice show-

ing the true value of the goods *per se* and the value of the charges separately, which thus showed the true facts that the collector prevented him from inserting in his entry.

Tryon vs. *Hartranft*, 31 Fed. Rep., 443.

How then can the importer be estopped by R. S., § 2900, when every paper in the entry, and every declaration required by law, showed that the entered value included the value of the charges on which the *law forbids* the estimation of any duty.

The importer made his entry under duress as the only means of getting his goods.

This is settled by the verdict under a charge of the court not excepted to; *vide* Record. folio 44.

Robertson vs. *Frank Bros. & Co.*, (No. 15 present calendar), R. S., 3011;

Maxwell vs. *Griswold*, 10 How., 242;

Hutton vs. *Schell*, 6 Blatch., 49, 50, 59;

Griswold vs. *Maxwell*, 3 Ibid., 413, Remarks 417–18;

U. S. vs. *Lawson*, 101 U. S , 169, near top;

U. S. vs. *Ellsworth*, Ibid., 173, near top;

The collector erred in refusing to act on the explanatory invoices, showing the separate value of the charges.

Howland vs. *Maxwell*, 3 Blatch., 146, 148, top;

Carnes vs. *Same*, Ibid., 420;

Lillie vs. *Redfield*, 4 Blatch., 41;

Schmeider vs. *Barney*, 6 Fed. Rep., 50;

R. S., 2788, 2789, 2926;

Sections 9–10–11, Act June 22, 1874, 18 Stats., 188.

And deliberately collected duty thereon, with full notice in the protest of the statute which enacted that charges shall not "be estimated in ascertaining the value of goods to be imported." The supplemental invoices (to say the very least), put him on official inquiry. They did not contradict the original invoices, but explained them where they needed explanation.

He cannot urge that the charges could not be separated from the market value, because the appraisement which it was his duty to call would have ascertained the market value, less charges. The appraisement is not confined to values of consular invoices. R. S. 2902 makes it the duty of the appraiser, collector and naval officer, "*by all reasonable ways and means in their power*," to appraise the *true* market value or wholesale price "any invoice or affidavit thereto to the contrary notwithstanding."

Section 2858 Revised Statutes, provided for this case, and the Regulations of the Secretary of the Treasury made thereunder, which would have afforded us the desired relief, are given at length in the Appendix.

Treasury Regulations of 1874, Article 333 to 335 inclusive, and Section 2926 Rev. Stats., would have done the same.

Section 2785 R. S., which prescribes the proceedings on entry says that "the person making the entry shall produce to the collector and naval officer, if any, the original invoices of the merchandise or other

documents received in lieu thereof or concerning the same."

The form of entry oath (Record, folio 19 and 20) contemplated that there might be, as here there was, some other invoice or account of the goods, as well as other invoices received later, and under that oath, the importer was obliged to produce the supplemental invoice on entry.

R. S., Sections 2922 and 2923 require, under heavy penalties, the importer to produce to the collector or any appraiser, on oath, any letters, accounts or invoices relating to any importations in order to ascertain the true market value or wholesale price. The production of these being so required, their use is inferrible.

Nevertheless, the Secretary had (wrongfully it is claimed) directed the collector to refuse all relief and to take duty on all free on board invoices without allowing any deduction of the value of charges to be made.

Treasury Decision 5621, Appendix.

This refusal to receive any other proof in aid of the original invoice relieved the importer from any obligation to produce it.

U. S. v. *Lee*, 106 U. S., 196, 200 middle, 202 above middle;

Atwood v. *Weems*, 99 U. S., 186-187;

Tacey v. *Irwin*, 18 Wall., 326;

Bennet v. *Hunter*, 9 Wall., 326;

Craig v. *Maxwell*, 2 Blatch., 548, near top;

Reynolds v. *Same*, Ibid, 556, 557.

We, however, did produce the proof on entry and it was refused, and did obtain a copy of the supplemental invoice duly consulated, to conform to R. S. 2858, as the evidence shows. Record, folio 25.

"It is a well-established principle that where an individual in the prosecution of a right does everything which the law requires of him to do and he fails to obtain his rights by the misconduct or neglect of a public officer, the law will protect him."

Lytle v. *State of Arkansas*, 9 How., 333, below middle.

R. S., Section 2900 has no operation on charges.

(*a*) It came into the revision from Sec. 7, act March 3, 1865, (15 Stats. 493–4) and the proviso that duties should in no case be assessed on less than the invoice or entered value was immediately followed by another proviso which repealed all acts and parts of acts assessing duty on charges, and since the repeal of R. S. Sections 2907 and 2908 (which, restored the duty on charges,) such is the law now.

(*b*) R. S. Sec. 2952 (same chapter as R. S. 2900,) says: "The words *value and values used in this chapte* shall be construed as meaning the true market value of merchandise in the principal markets of the country from whence exported at the date of exportation."

(*c*) Section 2900 also provides that the importer may on entry "make such addition in the entry to the cost or value given in the invoice as "may raise the same to the actual market value or wholesale price" abroad * * *Provided* that the duty shall be assessed upon not less than the invoice or entered value." The addition of the importer is to invoice

'*cost* or *value*' to make 'actual *market value* or wholesale *price*." This necessarily has no reference to *charges*, which are not parts of either.

(*d*) The term invoice value in Sec. 2900 applies solely to invoice price or market value and not to *invoice totals* from which the law allows deductions.

Marriot v. *Brune*, 9 How. 632–6.

Manhattan Gas Light Co. v. *Maxwell*, 2 Blatch. 408.

Among these deductions (referred to in *Marriot* v. *Brune*) are for damage, a reduction in value R. S. 2927, for short quantity landed, R. S. 2882, 2890; for price paid in depreciated currency R. S. 2903; for breakage R. S. 2504 Schedule D; for deficiency of articles in package R. S. 2921; for loss by fire or casualty in bond R. S. 2984; which list of abatements by Sec. 7 act of March 3, 1883, is extended to the value of charges if it be held that in any sense value includes charges.

As is said in *Marriot* v. *Brune* the importer may well be estopped as to the invoice *price*, for it is upon price or value that duty is to be assessed. But he need not be estopped about the invoice quantity or the value of goods, damaged or (as the law now is) about the value of charges, for duty is not collected upon them.

II.

A separate ground of protest was the refusal of the collector to refund the duty on the difference between the invoice quantity and the quantity landed.

This court has always held that duty is due only on the quantity landed.

The pretence of a difference in this regard between goods paying specific and *ad valorem* is unknown to the law, based on no reason, and in most of the cases here cited the duty is mentioned by the court as *ad valorem*.

Marriot v. *Brune*, 9 How. 619;
U. S. v. *Southmayd*, Ibid, 637;
Lawrence v. *Caswell*, 13 How., 488;
Balfour v. *Sullivan*, 17 Fed. Rep. 231, 8 Sawyer, 648;
Weaver v. *Salstonstall*, 38 Fed. Rep. 493.

The frequent re-shipments between the mines in Switzerland and the United States amply account for the very moderate loss in weight.

Judgment should be affirmed.

EDWARD HARTLEY,
WALTER H. COLEMAN,
Counsel for Defendant in Error.

APPENDIX.

Customs Regulations of 1874.

ENTRY WITHOUT INVOICE.

ART. 333. When the production of a certified invoice as above required is from any cause impracticable the Secretary of the Treasury is empowered to authorize the entry upon such terms and in accordance with such general or special regulations as he may prescribe. (Act Mar. 3, 1863, § 1.)

ART. 334. In case it is temporarily impracticable to produce at the time of entry a verified invoice which may be procured, if time be given for that purpose, the party desiring to make entry may file an affidavit of the causes of such impracticability to be accompanied by such other evidence as the collector may require, and execute a bond with sufficient sureties in double the amount of duty apparently due in the following form:

(Here follows the form of bond, the material portions of which are:)

"* * * Whereas the above bounden principal hath applied to the collector of customs, etc., to make entry of certain goods, etc., and, whereas, it is temporarily impracticable for the said principal to procure a proper invoice thereof, duly authenticated according to law, by reason whereof and in pursuance of law, entry of the said goods, etc., is allowed on appraisement and on execution of this bond."

Then follows the obligation to produce thereafter to the collector of customs a duly authenticated invoice of said goods, and to pay the excess of duties if any shown by the invoice to be due beyond those exacted on appraisement.

ART. 335. The merchandise will then be admitted to entry upon regular appraisement and compliance with all other requirements except for the time being, the production of the certified invoice.

Entry may be made upon an uncertified invoice, in the absence of a certified invoice, upon the due execution of a bond as aforesaid. This regulation will not be construed however as allowing entry upon an invoice made out in the United States, but only upon one which has been received from abroad a duplicate of which is to be subsequently produced certified by the consul.

When the certified invoice is received it will be compared with the entry, and the appraiser's return, and the balance of duty collected, if any appear to be due. If the invoice be not presented within the time limited by the bond, the latter will be handed to the district attorney for collection, unless the Secretary of the Treasury, on special application accompanied by suitable proofs, shall extend or cancel it.

(4617.)

Charges on Invoices.

TREASURY DEPARTMENT, *July* 20th, 1880.

The attention of this department has been drawn to the fact that notwithstanding the notices which have been published from time to time of the requirements of the law relating to the invoicing of imported merchandise, invoices are still occasionally presented to collectors of customs which do not specify the charges to be included under section 2,907 of the Revised Statutes in estimating the dutiable value of such merchandise.

In 1877, the department requested the Secretary of State to instruct United States consular officers abroad to have all dutiable charges inserted in invoices, independently of the price of the goods, and on the 13th of July, 1877, (Synopsis 3,298), decided that if charges were not added in the invoice and the goods "*were not expressed as free on board*," it was the duty of the appraiser to add such charges and 100 per cent. additional under the act of June 22, 1874. *The decision of April* 25, 1878, (Synopsis 3,550), *relating further to the matter, states that the appraiser is not authorized to accept any other evidence that charges are included in the value expressed in the invoice than a specification thereof in the invoice*, OR SUCH EXPLICIT STATEMENT IN THAT DOCUMENT THAT THE GOODS WERE PURCHASED "FREE ON

BOARD," OR THAT THE PRICE OR VALUE SPECIFIED INCLUDED THE CHARGES, as the case might be.

As it subsequently appeared that a summary enforcement of this rule would inflict loss in cases in which it had been the custom to regard certain charges as included in the invoice value Collectors of Customs were advised, October 4, 1878, (Synopsis 3735.) that when the price included charges for packing and cartons invoices might, for a limited time be accepted as correct, and in the instructions of August 27, 1870, (Synopsis 4163,) authority was given for the acceptance of corrected invoices in certain cases.

The Department is now of opinion that sufficient notice has been given of the requirements of the law upon the subject and that the original rule should be enforced.

You are therefore instructed to decline to accept such corrected invoices presented after October 1, 1880, and thereafter to cause dutiable charges to be added and duties regular and additional to be assessed in all cases in which the invoice presented does not specify such charges, *or explicitly state, as aforesaid, that the invoice price includes them.*

In the meantime corrected invoices may be accepted in the manner authorized by decision 4163, above cited.

(Signed) H. F. FRENCH,
Acting Secretary,

Collectors of Customs and others.

(4163.)

Invoices—Dutiable Charges.

TREASURY DEPARTMENT,
August 27, 1879.

SIR: Decisions No. 3550 and 3735, require the addition of packing and shipping charges, &c. to invoices where *the invoice by which entry was made*, does not contain a specification of the charges, *or does not state that the invoice price includes all of such charges.*

A strict enforcement of this rule was postponed from time to time to enable importers to gain a full knowledge of its requirements, and to communicate the same to their correspondents abroad.

Although some considerable time has elapsed since the rule was put into strict execution, it still occurs that invoices are received which do not conform to the rule, to which the appraiser is therefore required to make proper additions or charges. This seems to arise from various causes and is believed to be not in all cases the result of a willful disregard of the requirements of said regulations.

In some cases, where the invoice by which entry is made, failed to conform to said rule a corrected invoice has been subsequently presented duly certified by the consul, either showing such charges in detail OR CERTIFYING TO THE FACT THAT THE INVOICE PRICE INCLUDED ALL OF SUCH CHARGES.

It is the opinion of the Department that the main purpose of that rule will be observed by your accepting at any time within ten days after liquidation of the entry, a corrected invoice conforming to said

rule where the appraiser shall report that the price paid for the goods included the charges specified in such second invoice, and upon which the appraiser shall be required to make a proper return. Upon the receipt of such corrected invoice, the entry will be readjusted accordingly.

Where the corrected invoice is not presented to you within ten days from the date of the liquidation of the entry, and protest and appeal shall be filed, the Department will permit a readjustment of the entry under such appeal on receipt of a proper report from the appraiser, provided a corrected invoice conforming to the rule shall be produced within ninety days from the date of the instructions in any given case.

Very respectfully,

H. F. FRENCH,

Assistant Secretary.

COLLECTOR OF CUSTOMS, New York.

(4621.)

Oaths on Entries.

TREASURY DEPARTMENT, *Mar.* 22, 1883.

SIR: The Department is in receipt of your letter of the 16th inst, presenting various questions for decision in connection with the enforcement of section 7 of the Tariff Act of Mar. 3, 1883.

In reply, I have to state that in view of the fact that the oaths prescribed by section 2841 of the Revised Statutes to be taken on entries have not been modified but remain in force until July 1, such oaths should continue in force until that time, and the en-

tries must correspond thereto. The mere fact however, that invoices and entries include non-dutiable charges does not, thereby, render such charges liable to duty, and in proper cases the duties should not be levied on the charges and commissions when they can be properly ascertained.

Where, however, an invoice of goods declares that they have been delivered to the purchaser on the exporting vessel free of all charges to him, the value stated in the invoice must be taken as that upon which duties shall be levied, provided of course, that the appraiser makes no advance thereon.

Goods actually remaining in bonded ware-house or public store, when the 7th section of the act referred to took effect, may be considered as entitled to a readjustment of the duty under said section without regard to protest, it being the duty of the department and of its officers to enforce the law as enacted by Congress. The department does not deem it wise or within its authority to enlarge the scope of the act so as to extend the provisions of section 10, in connection with section 7, to goods not in public store or bonded ware-house when the act took effect, and which were imported prior to that date. Goods imported prior to the act taking effect, and which remained in general-order-store, are to be considered as in bonded ware-house, and the rule before laid down applies accordingly.

Very respectfully,

H. F. FRENCH,
Acting Secretary.

COLLECTOR OF CUSTOMS, NEW YORK.

FILED
NOV 4 1889
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

October Term 1889.

WILLIAM H. ROBERTSON,
Pl'ff in Error,

vs.

HENRY R. BRADBURY,
Def't in Error.

No. 58.

Supplemental Brief for Defendant in Error.

The question whether or not section 7 of the act of March 3, 1883, took effect on the approval of the act, or on July 1, 1883, was not presented to the court below, and so cannot be considered here.

Badger vs. *Raulett*, 106 U. S., 255, 259-60;
Morrill vs. *Jones*, 106 U. S., 466;
Walker vs. *Saurinet*, 92 U. S., 90, 93;
Flournoy vs. *Lastappes*, 131 U. S., LXI., (omitted cases.)

That question was raised for the first time five years after the transactions in this case in *Babson* vs. *Robertson*, No. 1075, of the present calendar.

But if this court decides to hear it, we have to say:

I.

There is no statute fixing the time when acts of Congress shall take effect, *but it is settled that where no other time is prescribed they take effect from their date.*

Lapeyre vs. *United States*, 17 Wall, 198;
Matthews vs. *Zane*, 7 Wheat., 211;
Opinions' Att'y Gen., Vol. 3 p. 82;
The Brig. Ann, 1 Gallison, 62;
U. S. vs. *Morton*, 97 U. S., 170;
Treas'y Decision, 5612, March 12, '83 in the Appendix.

II.

The words of section 7 import that it should take effect at once. The present tense is used: the words "be and the same are hereby repealed" standing alone have that meaning, and the word "HEREAFTER" has no meaning whatever without it.

III.

It is sound public policy that the time when statutes should take effect should rest upon the plain words of the statute, and not upon inferences of intention—the most fruitful matters of dispute among lawyers.

IV.

These propositions being admitted, the burden of proof is on the collector to show that section 7 takes effect at a different time from that indicated by its language and from the general rule of law.

For, to overcome a rule so firmly rooted in authority, reason and public policy, the evidence (if intention can be inferred at all) that a section should take effect at a different time, must be overwhelming.

V.

We might safely rest our case here, but we are prepared to show that there is nothing in the act which requires that section 7 should take effect at any other time than that of its passage.

Act March 3, 1883, 22 Stats., page 488.

Sections 1 to 5 are Internal Revenue provisions; some taking effect on *specified* dates, such as May 1, and July 1, 1883. Sections 3 and 5, took immediate effect. Section 6 is a substitute for title 33, Revised Statutes, and takes effect on July 1, 1883. It relates mainly to rates of duty for the operation of which the presence or absence of charges is entirely immaterial.

In acts legislating on both duties and charges, the rates of duty frequently take effect at various times stated, and the provisions upon charges on the passage of the act precisely as in this act of 1883.

Act July 28, 1866, 14 Stats., 328, Section 9, contains the sections 2907 and 2908 of the Revised Statutes, repealed by section 7 of the act of '83, and it takes effect, like the section in question, at the date of approval. Section 1 (rates of duty) takes effect August, 1866.

Act June 30, 1864, 13 Stat., 202, Secs. 1 to 13 (rates of duty) take effect July 1, 1864; section 27, Jan. 1, 1865, the remainder when? Section 24 makes charges

dutiable, and no time is fixed; just as in section 7, act of March 3, 1883.

Act May 19, 1828, 4 Stats., 270, Section 1 (rates of duty), takes effect Sept. 30. Sections 2 to 6 (rates of duty) take effect June 30; for the remainder of the act no time is fixed. Section 8 (like Sec. 7, here) imposes duty on charges; when, under the defendant's theory, can section 8 take effect, the rates of duty going into effect on different dates? When, but on its passage?

Act July 30, 1846, 9 Stats. 42 (rates of duty), take effect Dec. 1. Section 8 requires charges to be added to entry, and no time is fixed for its operation. The same is true of sections 4, 7, 9 and 10.

How, then, in view of this legislative habit of Congress, can we assume that Sec. 7 of the act of 1883 should not take effect on the date of its passage, like similar sections heretofore?

VI.

The point that Section 7 did not take effect until July 1, 1883, instead of on the passage of the act, is an afterthought, not raised until five years after the passage of the act, and no authority is known to support it, except a ruling at *nisi prius*, by Judge Lacombe, last year, in *Babson* v. *Robertson*, in which case he said, of Section 8:

> "Its *sole* purpose, when it is examined in connection with the section of which it is an amendment, indicates that it was part of the plan, or scheme, for relieving importers from the obligation of paying duties upon the coverings in which their goods come to this country, and that section expressly provides that it shall go into effect on and after the first day of July, 1883."

Plainly, that is *not* its sole purpose. It did not help to carry section 7 into effect, because that section was self executing and did not need any help; but section 8 did carry other purposes into effect.

The report of the Tariff Commission to Congress, on which this law was passed, says, (page 37).

> "The proposed changes in section 2841 are (1) to conform the oaths to the proposed change in the mode of levying duties by excluding inland freights, packages, charges and commissions from being the subject of duty; (2) to require the oath to show that the invoice and declaration are in all respects true, and were made by the person by whom the same purports to have been made as provided in other sections; and (3) in case where part of the invoices or bills of lading covering merchandise to the person making the entry have not arrived, to allow him to enter those invoices which have arrived and permit the others to be entered on the receipt of the invoice and bills of lading which cover them. The law now requires that the oath shall state that the entries cover all the goods, wares and merchandise imported in the vessel for the consignee, and as he cannot enter lawfully, without the production of the invoices and bills of lading it seems necessary to make this change so as to permit him to enter the goods for which the invoices and bills of lading have arrived, with the right to enter the remainder of the goods consigned to him where he can lawfully do so, without sending the whole consignment to the general order stores to await arrival of the papers which will enable him to make a complete entry of the whole consignment."

The new oath has a new clause, to wit: "that the invoice and the declaration therein were made by the

person by whom the same purports to have been made." This requirement must necessarily take effect at a future day, so that an importer, by correspondence with his foreign consignors, could prepare them for the change and obtain the information to be stated in the oath. A consignee would not in general know the parties to these declarations nor have the necessary information to take the oath.

But this strong reason for the postponement of section 8 to July 1, 1883, had no connection with the charges repealed by section 7.

It is not true that section 8 is "part of the plan or scheme for relieving importers from the obligation of paying duties upon coverings.

Section 8 conforms the old entry oath to the new state of the law; standing alone it would not affect the duties on charges in the least; but secotin 7, of itself, effectually repealed them.

Section 7, last clause, act of March 3d, 1865, (13 Stats., 494, middle,) abolished the duty on charges altogether, and yet no change was made in the entry oath (which remained intact from 1823 to 1883—sixty years—under all changes of the statute) because no change was necessary whether charges were dutiable or not.

As charges are still required to be *stated* in the invoices, Rev. Stats., Sec. 2845 and 2854; and also in the entry, Rev. Stats., Sec. 2785, (presumably that importers may not deduct as charges that which is a part of market value), the old oath was as applicable as the new, and, in point of fact, was used all the time as stated hereafter.

VII.

In addition to the general rules the special reason for putting section 7 into immediate operation on the date of its passage is that the duties on charges *were for purposes of administrative reform abated as a nuisance, and the quicker the section went into effect the greater the public benefit*, as the extracts from the report of the Tariff Commission and the testimony taken by it shows. See appendix.

VIII.

The administrative and practical construction of the law during the time in dispute (between March 3 and July 1, 1883), was, that section 7 went into effect on its passage.

The Secretary of the Treasury so held and instructed all customs officers. In one of his decisions he took account also of the new oath. *Vide* Treasury Decisions, 5612 and 5621 in Appendix.

It was only lately (five years after the question ceased to be practical) that the defense was first raised. During the time in dispute, from March 1, to July 1, 1883, the whole importing interest under Treasury Circular 5621, went on deducting charges and using the old oath, without question, and with no practical difficulty. Neither the Government officers nor the public supposed, that section 7 went into effect at any other time than on its passage; and the whole business of the country was tranacted accordingly.

Robertson v. *Downing*, 127 U. S. 607.
U. S. v. *Philbrook*, 120 U. S., 58, 59.
U. S. v. *Hall*, 3 idem., 182-'3.

U. S. v. *Alexander*, 12 Wall., 180, 181.
U. S. v. *Pugh*, 99 U. S. 268 bottom, 269 top.
Edward's lessee, v. *Darby*, 12 Wheaton, 210, near bottom.
U. S. v. *Tappan*, 11 Wheaton, 422.
U. S. Bank North Car, 6 Peters 39, 40.
Stairs v. *Peaslee*, 18 How., 526 middle, 530 top.
2 *Opin. Att'y Gen.*, 223, 558, 10 Id., 52, 56, 250, 14 Id., 661, 7 Id., 719, 5 Id., 563, citing, 9 Peters, 256.
U. S. vs. *Ship Recorder*, 1 Blatch., 9 Id., 218, 222, 5.

The judgment should be affirmed.

EDWARD HARTLEY,
WALTER H. COLEMAN,
Counsel for defendants in error.

APPENDIX.

(5,613.)

Treasury Decisions.

CHARGES AND COMMISSIONS.—REPEAL OF DUTIES ON.

TREASURY DEPARTMENT, *March* 12, 1883.

The following letter of this date is published for the information and guidance of officers of the customs:

H. F. FRENCH,
Acting Secretary.

"COLLECTORS OF CUSTOMS AND OTHERS:

SIR: I transmit herewith a copy of an act entitled 'An act to reduce internal revenue taxation and for other purposes,' approved March 3, 1883.

This act, besides reducing internal revenue taxation, makes large alterations in the tariff.

Various sections recite the date when each shall go into effect, and so far as concerns these sections those dates control.

Section 7, however, names specifically no date when it is to go into operation, and the department holds that it takes effect from and after the date of the passage of the act—that is, to say, at the beginning of the 4th day of March, 1883.

That section repeals sections 2,907 and 2,908 of the Revised Statutes and section 14 of the act

entitled 'An act to amend the customs-revenue laws, and to repeal moieties, approved June 22, 1874, and declares that hereafter none of the charges imposed by said sections or any other provisions of existing law shall be estimated in ascertaining the value of goods to be imported, &c.

Section 10 of the act provides that all imported goods, wares and merchandise, which may be in public stores or bonded warehouses on the day and year when the act shall go into effect, except as otherwise provided, shall be subjected to no other duty upon entry thereof for consumption, than if the same were imported respectively after that day.

It is held that this provision is applicable to duties on charges and commissions connected with goods imported prior to the passage of the act, but remaining in bonded warehouse, &c., from and after that day.

Section 9 of said act also takes effect at the same time as section 7.

You will take action accordingly.

H. F. FRENCH,
Acting Secretary.

COLLECTOR OF CUSTOMS,
NEW YORK, N. Y."

Treasury decisions 5,651 is given in full, in appendix to our original brief.

Report of the Tariff Commission.

"The recommendations for the repeal of Section 2907 and 2908 are made on the statements of Custom House experts and importers generally, who have uniformly insisted that justice requires their repeal.

The Commission recommends the repeal of these sections, because of the great labor at the Custom House in apportioning and distributing the charges on the liquidation of entries (as we are advised the work of liquidation ad valorem goods is more than double, by reason of these charges and their distribution), the very great delay in liquidation consequent on the complicated calculations involved in the distribution of the charges on the goods in invoices bearing different rates of duty, the delay, annoyance and expense to the importer arising from the necessarily tedious liquidation thus occasioned, and because, in the judgment of the Commission, these charges should not be regarded as part of the cost of the goods."

Report of Tariff Commission, page 41.

"Perhaps the most important and radical change recommended is the repeal of the sections of the existing law requiring the addition of inland transportation, costs and charges to the basis of an ad valorem duty. Although the repeal of these sections will effect a large reduction of duties, especially on bulky goods, such repeal was strongly recommended both by Custom House experts and importers as a measure of relief from the greatest source of annoyance in the liquidation of duties on imported merchandise."

Report of Tariff Commission, page 9, bottom.

"I would like to say something in regard to the charges and commissions. That is a very annoying thing in regard to the invoices. It is very difficult to locate the charges on inland goods, particularly as the Department has decided that the charges appertain to the frontier of the country where the goods come from."

LEWIS MCMULLEN,
Appraiser.

Tariff Commission Report, p. 445, middle.

"Does not this matter of charges give rise to a great deal of trouble?

"A. Yes, sir; it does.

"Q. Do you know of any matter which has given rise to greater complaint on the part of importers than this matter of charges?

"A. It is a matter concerning which numerous complaints have been and are being made. This whole subject is very annoying. It is trifling in amount usually, and is not worth the trouble it costs both to the importers in getting their invoices through the Custom House and to the Custom House officials."

W. S. HOYT,
Appraiser.

Ibid, p. 461.

"I would also like to say a word in regard to the subject of charges and commissions. I can see no reason why a box sent with silks from Lyons should pay sixty per cent., and another box sent with figs from Smyrna should pay nothing. Boxes are merely vehicles of trade. Commissions are purely imaginary and arbitrary.

* * * * * *

"Q. Aside from these considerations is it not a source of constant annoyance and trouble, both to the importer and the Custom House officer, in distributing these charges and commissions on different goods and different invoices?

"A. Yes it is." [The remainder of this testimony is valuable, but too lengthly to quote.]

DAVID C. STURGES,
Appraiser.

Ibid, pp. 501, 502.

"Q. Is not this whole subject of charges and commissions one productive of great complaint and trouble?

"A. Yes, sir; I think so. My opinion is that it would be much better to abolish them.

"Q. Instead of abolishing them would it not be better to establish a uniform rate for commissions and a uniform rate for charges; a fixed rate?

"A. I do not think it would myself; if you desire my opinion on that subject.

"Q. Why not?

"A. Because it would produce great discontent on the part of the merchants."

L. B. CARHART,
Ibid., p. 524. *Appraiser.*

"I have a memorandum here which I have made in regard to the charges and commissions. We find a great many complaints from importers in regard to these charges and commissions."

JAMES F. HALL,
Ibid. p. 543. *Appraiser.*

"As a matter concerning all divisions of the appraiser's department, I would call your attention to the question of charges which, if a certain nature, form a part of the dutitable value of the merchandise.

"The law provides that such charges must be added to the market price of any merchandise in determing the dutiable value thereof. (S. 2,907 R. S.)

'This section of the law causes many annoyances, and is at the same time not productive of large revenue, while it works injustice, inasmuch as additions for certain charges (for freight, coverings, &c.) must be omitted in case the invoice reads free on board and free of charges for packages.'

"We experience great difficulty in the matter of determining the charges to be added in making up the dutiable value of the goods."

IMANUEL AUERBACH,
Ibid. p. 558. *Appraiser.*

"I am of opinion that the duty should be entirely abolished on all packing charges, shipping charges, brokerages and commissions. In other words, I believe that the dutiable value should be the wholesale price of the goods at the actual market in which they are purchased. The compulsory addition of these petty charges yields no considerable revenue and entails incessant annoyance on the importer."

MARSHALL FIELD,
Merchant.

Ibid. p. 1048.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

ROBERTSON

v.

BRADBURY.

No. 98.

ADDITIONAL BRIEF

ORDERED BY LETTER OF CLERK, DATED [illegible], 1

OF THE ACT APPROVED [illegible], 1934, [illegible]

EDWIN B. [illegible],

[illegible]

[illegible]

Of Counsel for [illegible]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

WILLIAM H. ROBERTSON, Plaintiff in Error, AGAINST HENRY R. BRADBURY, Defendant in Error.	No. 58.

ADDITIONAL BRIEF upon question when Sec. 7, Ch. 121, Act Mch. 3, 1883, took effect.

I.

The propriety of the assessment upon Mr. Bradbury's importations we do not propose to discuss in this brief, except so far as the first page of the Attorney-General's "Argument" (Brief, pp. 11 and 12) incidentally suggests, in vindication thereof, that Section 7 of the Act of March 3, 1883, Ch. 121, abolishing duties upon charges, did not go into effect until the first day of July of that year.

This issue affects the rights of every protesting merchant in the country whose importations arrived between these two dates and were appraised for duty inclusive of charges; and is too far-reaching and serious in its consequences, legal and pecuniary, to be

allowed to pass into a determination *sub silentio*, or as a mere incident to a discussion that is in fact itself of far less importance.

This claim of the Attorney-General is based upon a misconception, easily corrected by directing the attention of the Court thereto. It is this. At the top of the twelfth page of his brief, he erroneously assumes that the declaration of the sixth section of the act that on and after July 1st. 1883 "the following sections" shall constitute and be a substitute for Title 33 of the Revised Statutes—refers to "the *following* sections" of this Act of 1883, instead of to the indicated sections of the revision which would constitute its thirty-third Title after July 1, embraced in said *sixth* section.

"The *following* sections," if applied to such sections of the Act of 1883, would not embrace the *sixth* section, really the *only* one intended as a substitute for R. S., Title 33, and *which is the one imposing rates of duty;* since that section (6) does not *follow* itself! Plainly, "the following sections," then, intends only those embraced within Sec. 6 as constituting the proposed substitute for Rev. Stats., Title 33; and the sections of the revision (Secs. 2907, 2908 and 2841) mentioned in Secs. 7 and 8 of this Act of 1883 *never were part of this title*, but of Title 34, and no reason for transferring them can be imagined.

Reference to the context, and to the whole act, in its entirety, demonstrates that "the following sections" referred to in Section 6, are those, titled and numerated, which are embodied as part of said section (22 Stats. 489 to 523).

Immediately following the three lines declaring that after July 1, 1883, the following sections should be a substitute for Title 33 appears this ;—the proposed substitution ;—

"TITLE XXXIII.

DUTIES UPON IMPORTS.

Sec. 2491." (Giving the identical phraseology of the revision.)

Then follow, in regular sequence of notation, Sections 2492 to 2513 which last reproduces (in *totidem verbis*, except the probably-accidental omission of an 'on') the phraseology of the prior R. S., Sec. 2516, *the last section of Title XXXIII.* This section (so numbered 2513) is the last of the sections given in Sec. 6 of the Act of March 3, 1883, as part of said Title XXXIII. as it was to be on and after July 1, of that year. (22 Sts. 523).

As already noticed, the latter sections of the Rev. Sts., mentioned in Secs. 7 and 8 of the act, were, appropriately, part of Title XXXIV.

II.

The Attorney-General's assumption of an *express* declaration, in Sec. 6, that Section 7 was not to go into effect until July 1st, having been shown to be groundless the inquiry is suggested by Judge LACOMBE'S ruling in the Babson case (No. 1075 of this docket) whether there can be any *implied* postponement of the taking effect of a statute? and, if so, whether there is any fair implication of a purpose so to postpone the operation of this Section 7 of the Act of March 3, 1883, ch. 121?

The Supreme Court, in view of Sec. 7 of Art. I of the Constitution, adheres to "the known rule," *i. e.*, "that a statute for the commencement of which no time is

fixed, commences from its date;" (7 Wh. 211)—and, the Courts may, "when substantial justice requires it, ascertain the precise hour when a statute took effect by the approval of the executive." (104 U. S., 478.)

Matthews vs. Kane, 7 Wheaton, 211.
Louisville vs. Savings Bk., 104 U. S., 478 bot.

"We look to the final act of approval by the executive to find when the statute took effect; and, when necessary, inquire as to the hour of the day when that approval was in fact given." *Ib.*, 479.

The date of the approval of Ch. 121, "An Act to reduce internal revenue taxation, and for other purposes," was *March 3, 1883.* (22 Stats., 388-426.)

Upon that day the statute itself took effect. If any of its provisions were *subsequently* to go into operation, this was because the Act approved March 3, 1883, declared the law to be that upon and after a later day such provisions should be effective in their operation upon persons, property and rights; and those portions of the act to which no later day was *specifically* assigned became imperative in their mandates, to citizen and official, *eo instanti* by the affixing of the President's signature.

Gardner vs. Collector, 6 Wall., 506.

As the Constitution makes this final signature the definitive beginning of a law, it would seem that an *express* declaration would be necessary to defer the practical operation of any of its provisions; that the constitutional effect of executive approval could not be, *pro tempore*, nullified by any conjectural inference from a hypothetical general uniform scheme or design, attributed *arguendo* to the Legislature.

No such uniform scheme as is supposed appears from the several sections or general tenor of the act in question.

The Act, Sec. 1, in its opening sentence, declares

"that the taxes herein specified imposed by the laws *now* (March 3, 1883) in force, be and the same are hereby repealed, as hereinafter provided, namely, on capital and deposits, etc., except such taxes as are *now* due and payable"; and on and after the first day of July, 1883, the stamp-tax on bank checks, etc., and the tax upon matches, etc., imposed by Schedule A, Sec. 3437, Rev. Sts.; with two provisoes, that no drawback should be allowed upon articles of that schedule on and after July 1, 1883, but that on and after *May 17, 1883*, matches (and no other of the articles enumerated in Schedule A) may be removed by the manufacturers from their factories to their warehouses without affixing stamps. (22 Stats. 488.)

The second section fixes the annual tax upon tobacco dealers, wholesale and retail, on and after *May 1st.*, 1883. (*Ibid.*)

The third section declares that "*hereafter*" (to wit, after Mch. 3, 1883) the special tax of a dealer in tobacco shall not be required of any farmer," etc. (22 Stats. 489 top.)

Can there be any doubt that a farmer who desired to deal out tobacco supplies to his hands between March 3, 1883, and May 1, 1883, could do so without payment of *any* tax; although, other persons engaging in the sale of tobacco between those dates would have to pay the higher tax, until the first day of May arrived.

Sec. 4 reduces, "On and after May 1st, 1883," the tax upon snuff, smoking-tobacco and cigars; (22 Sts. 480) while Section 5 declares "That *from and after the passage of this act*" every manufacturer of tobacco or snuff shall affix to every package thereof a specified label and notice. (*Ibid.*)

Here end the internal revenue provisions.

The sixth section declares "that on and after the first of July, 1883 the following sections shall constitute and be a substitute for title thirty-three of the Revised Statutes of the United States." (*Ib.*)

Enough has been said as to this phraseology in the previous division of this brief answering the Attorney-General's contention.

The seventh section to which the present controversy relates, declares that Sections 2907 and 2908 of the Revised Statutes, *and Section 14 of the Act of June 22d, 1874*, are *hereby* repealed, and *hereafter* "none of the charges imposed by said sections," or any other provisions of *existing* law "shall be estimated in the process of levying duties. (*Ib.* 523.)

The repeal is "hereby";—by and concurrently with the signing of the act. The "hereafter" must be after that signing; the "existing" law that which only ceases to exist when the presidential signature caused the Act of March 3, 1883, to supersede it.

Would there not be as much propriety in taxing a farmer for supplying his hands with tobacco between March 3 and May 1, 1883, as in assessing the charges upon an importer between March 3 and July 1, 1883?

It will be observed that Section 7 of the Act of March 3, 1883, immediately and absolutely *repeals* Sections 2907 and 2908 (Title XXXIV.) of the Revision, and the Moiety Act, and "hereafter" none of the charges imposed by *any* "provisions of *existing* law" shall be estimated, etc.:—while the eighth section of this Act of March 3, 1883, *amends* R. S. Section 2841, so that it shall after July 1, 1883, be as there recited.

Thus, Sections 2907–8 are *repealed eo instanti*, and never exist again; while Section 2841 continues to exist, and is only *amended in futuro*.

The only substantial difference between the oath administered before and after this date was in the omission of the phrase relating to 'charges,' which had ceased to be dutiable. Certain other verbal changes were incidentally introduced, to make it clear that the character of the new basis of assessment *as to goods themselves* remained unchanged; that the market value

or cost to be ascertained meant such value or cost (of the *goods*) in the condition in which they were imported —which was also the element considered before the amendment. The reason for the postponement of the administration of the oaths formulated by this Act of 1883 is obvious, and concerns a ministerial difficulty. The intention to wipe out instanter all laws imposing duties upon charges could be carried out by the appraisers, in making their computations, upon the very day the law was approved, precisely as well as at any later date; while the custom-houses of the country were fully stocked with the old form of oaths, and could have none of the new; and all incoming invoices would be based upon the old requirements. The chief thing—the immediate abolition of charges, like the instant abolition of the internal-tax upon bank capital and deposits—being accomplished, the minor matter of changing the mere form of oath could be postponed conveniently until blanks could be furnished, inasmuch as the old form contained nothing contradictory to the new. That is, the invoices then filled would state the charges though these would no longer be dutiable; and it would be better to require the importer to continue to indicate them for three or four months after ceasing to pay duty upon them, than to require the Custom-officers of a port like New York to administer oaths of which there were no blank forms in the Custom House; but it would hardly be deemed advisable to retain a tax adjudged unnecessary, oppressive to the merchant and vexatious to the customs-officer, simply upon a question of stationery; though, in the mere administration of oaths, this was a serious difficulty.

Section 9 evidently was designed to apply a *present* remedy to an evil equally likely to arise under the former legislation and this act; *i. e.*, the non-existence of any open "market value" of goods of a character manufactured abroad solely for consignment to persons in this country.

Section 10 places goods in the public stores " on the day and year when this act shall go into effect " upon the same footing as those imported upon that day.

The use of this language is significant. The day when the act would go into effect by presidential approval was uncertain; yet the duty upon bonded goods is to be affected by *that act* of approval, and not by the arrival of a fixed date, like the first day of July. And it must be recollected that *it was only as to this matter of charges that the act created an immediate change of the duty to be paid;* so this phraseology of Section 10 would have been inappropriate had not *this* change been incidental to and concurrent with the approval of the act.

III.

The contemporaneous construction given by the Treasury Department to this act is shown by the appendix to the brief of Messrs. Hartley & Coleman.

Another recent decision as to the effect to be given such construction is

U. S. vs. Johnston, 124 U. S., 253.

IV.

" But, if the question were one of doubt, the doubt would be resolved in favor of the importer," etc.

Hartranft vs. Weigmann, 121 *Id.*, 616 top, and its numerous citations.

In the present statute, certain provisions indisputably took immediate effect, March 3, 1883.

The most that can be contended as to Section 7 is that certain reasons can be suggested which, if they had occurred to Congress, *might* have induced the assignment of the date of July 1, 1883, to that section—and might *not*.

No " expressed intention of Congress " was requisite for Section 7 to take effect March 3, 1883 : it would be for it to do so at any later date.

As was observed by SELBORNE, L. C., in Munic. Bldg. Soc. vs. Kent ;—

" It is never very safe ground, in the construction of a statute, to give weight to views of *its policy, which are themselves open to doubt and controversy.*" 9 App. Cas. 273.

" We ought to find out the meaning of a word *from the section itself*, and if we can do that, we need not have recourse to the use of the same word in the other sections of the acts." Spencer vs. Metrop. Bd. 22 Ch. Div. 162.

If this be so, where a word is repeatedly used in different sections, *a fortiori* does the principle apply to a word (like ' hereafter ' in the Sec. 7) employed only in one of the sections.

" We ought not to restrict a section in An Act of Parliament by the preamble or *general purview* of the act, where the section is not inconsistent with the spirit of the act."

Sutton vs. Sutton, 22 Ch. Div. 511, JESSEL, M. R.

In the same case, another Justice (COTTON, L. J.) observed ;—

" I think the true principle of construing Acts of Parliament, and other documents, is to see what is the fair and reasonable construction of the words themselves, and to apply them accordingly ; and if Parliament has used language which does not express what the intention was, it is the duty of Parliament to amend it. I think the courts bring themselves into great difficulties

when they attempt to alter the fair meaning of a clause in an act of Parliament, and thus to frame what, in their view, *would have been* a better enactment." 22 Ch. Div. 518.

In the present instance, there is no claim that the ordinary sense of the explicit language of this Section 7, giving it immediate effect, is contrary to the *general purview* of the act; but that another section, with which Sec. 7 has no *necessary* connection, is to become operative at a later, fixed date.

EDWIN B. SMITH,

Of Counsel for litigants, in cases in this and the Circuit Courts, having an interest in the question.